LAW AND CONTEMPORARY PROBLEMS

LABOR DISPUTE SETTLEMENT

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CONTENTS

LABOR DISPUTE SETTLEMENT

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FOREWORD

The industrial truce which prevailed between the termination of the coal strike in December, 1946, and the beginning of the telephone strike in April, 1947, did not obscure the fact that the settlement of labor disputes is this country's most critical postwar domestic problem. While there have been encouraging signs of the ability of labor and management to work out their own solutions through collective bargaining, this interlude must probably be characterized as a truce for the purpose of re-examining the legal devices for dealing with industrial disputes. There was watchful waiting while the judicial process brought forth its answer to the question whether the injunction was still a potent, if limited, strike-breaking weapon.* There was a shift of forensic energies from the bargaining table to the committee room as legislative bodies reappraised existing labor laws and talked of new ones. The ugly, black headlines of the days when there was no coal, no steel, no rail service were absent, but the basic public issues remained.

Fortunately, this opportunity to consider the issues calmly has been utilized. There has been a disposition to examine proposed remedies dispassionately, and to consider their long-range implications for basic individual liberties and for the free enterprise system. In the same spirit, LAW AND CONTEMPORARY PROBLEMS presents in this issue a significant cross-section of thought on these issues.

In the first article Mr. Paul H. Sanders, who planned this symposium, analyzes the types of labor disputes and the avenues of approach to their settlement. In the second, special applications on a local and unofficial basis of the techniques of mediation and conciliation are discussed by Mr. Arthur W. Hepner.

In the third article, Professor Benjamin M. Selekman and Mrs. Selekman direct attention to the psychological and sociological conditions of work in the modern factory as underlying causes of the frictions which lead to industrial disputes. This emphasis upon the psychological sources of conflict is continued in the next article, in which Mr. Isadore Katz makes a strong plea for broad and effective grievance procedures as "powerful purgatives of industrial unrest."

In the fifth article, Professor Alexander Hamilton Frey develops the thesis that collective bargaining in labor relations is vital to the preservation of the American

* United States v. United Mine Workers of America, 67 S. Ct. 677 (March 6, 1947).

system of free enterprise, and that arbitration is an essential element and an outgrowth of collective bargaining.

In the sixth article, Professor John T. Dunlop examines candidly the contribution which economic analysis can make to the settlement of specific wage disputes. If his conclusions seem pessimistic to any who cherish the illusory precision of certain formulas in current use, it must be remembered, as the author points out, that the identification of problems is the beginning of economic wisdom.

The next four articles deal with the distinctive and paramount problems of contract-negotiation disputes. Messrs. Fairweather and Shaw undertake to formulate principles for collective bargaining as a means of minimizing disputes in labor contract negotiation, and proceed to consider each of the problems typically arising in the course of negotiating a collective agreement. Mr. John S. Forsythe analyzes and compares the provisions of bills which have been introduced in the Eightieth Congress in so far as they bear upon the settlement of contract-negotiation disputes. Mr. Bernard H. Fitzpatrick, presenting a business viewpoint, maintains that a prerequisite to any policy for labor dispute settlement is the formulation of functional principles of union organization. Mr. Boris Shishkin, presenting a labor viewpoint, places his faith for the avoidance of work stoppages in direct collective bargaining, enlightened by full technical information and supplemented by conciliation, mediation, and arbitration.

Finally, Mr. Jesse Freidin, in a temperate and thoughtful article, finds that the public interest in the settlement of labor disputes will be best served by the encouragement of responsible and bona fide collective bargaining and by giving to the fruits of that process the widest recognition and protection.

The variety of the opinions expressed should make it clear that this symposium is not intended to give aid and comfort to the cause of either labor or management. It would be impossible to reconcile these views for the purpose of any partisan thesis. The most elementary obligations of editorship, however, require reference to the significant unanimity which pervades this diversity of opinion. The dominant and harmonious theme is faith in democratic institutions, in free enterprise, and in the ultimate effectiveness of free collective bargaining. Each contributor who has had occasion to refer to the subject, irrespective of his background or affiliation, has expressed opposition to compulsory arbitration and other forms of dictated settlement in disputes which arise from the failure of the parties to agree on terms and conditions of employment. Government has a role to play, but in the view of these contributors that role should be confined to formulating policies which fix the conditions of collective bargaining, to furnishing the complete technical information which can transform the bargaining process from an emotional altercation into a rational discussion of largely factual issues, and to assisting the bargaining process by making available conciliation, mediation, and arbitration facilities.

BRAINERD CURRIE.

TYPES OF LABOR DISPUTES AND APPROACHES TO THEIR SETTLEMENT

PAUL H. SANDERS*

The readers of this symposium will include not only persons familiar with labor disputes but also interested general readers who have had little first-hand acquaintance with such matters. It is primarily for the latter group that this note is intended. Its purpose is to discuss the general categories into which such disputes fall and, very briefly, the several ways in which settlement of such disputes can be sought. Detailed treatment of these approaches to settlement is reserved for separate articles appearing elsewhere in this issue.

I

The National Labor Relations Act and the Norris-LaGuardia Anti-Injunction Act contain the same definition of the term "labor dispute."[1] This definition is more notable for its scope, however, than for the enlightenment it affords concerning the variety and complexity of situations which can develop when employers and labor unions engage in altercation.

One obvious approach to some systematic arrangement of "types of labor disputes" would be in terms of the forms of pressure exerted by one side or the other. Pressure moves in labor disputes are what the public sees; they are the matters which receive the greatest attention from the press. A second approach, and a more fruitful one from the standpoint of settlement, would classify the basic dispute in relation to the collective-bargaining status of the parties.

Using the first approach, it may be noted that labor disputes are at times accompanied by strikes, picketing, slowdowns, boycotts, lockouts, black-listing, strike-breaking or other similar incidents (involving, perhaps, violations of law by representatives of one side or the other). These are the external evidences of the dispute; they do not tell us much about the basic controversy. And there may be labor disputes involving none of these features which nevertheless require settlement.

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[1] "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 49 STAT. 450 (1935), 29 U. S. C. §152(9) (1940); 47 STAT. 73 (1932), 29 U. S. C. §113(3) (1940).

If it were desirable, it would be possible to analyze the measures taken by the parties to labor disputes in terms of economic strategy, physical tactics, psychological warfare, and political maneuvering. It is possible, in fact, to view the whole body of labor law in terms of the judicial and legislative process which from time to time alters the relative strength of the parties, now giving a potent legal weapon to one side or the other, and again rendering legally ineffective a device used by one of them. Analyses along such lines, although they have some utility and are appealing because of the dynamic character of the subject-matter, overemphasize the "struggle" aspect of labor relations and distort out of all recognition the economic function performed by the enterprise in which the employment is carried on and the relationship that must exist between employer and employee in carrying out that enterprise with the maximum of benefit to the parties and the general public. If one of two parties, engaged in an enterprise in which there is mutuality of interest, wins a "battle" over the other, the probability of success of the enterprise will be lessened in proportion to the damage inflicted. Normally, however, it is the employer and his employees who are engaged in the mutual enterprise—not the employer and a union, unless the employees have chosen to make the union their *alter ego* for this purpose, or the employer has accepted the union as acting for his employees in a complete sense.

No attempt will be made here to define the pressure measures referred to above, since most of them are familiar to readers of the newspapers today. Certain special situations may deserve comment because of their prominence in current legislative proposals. A strike is a concerted cessation of work by employees seeking some concession from an employer. The *jurisdictional strike* seeks the concession at the expense of another union, or group of employees acting in concert. The dispute is really then between the two unions or groups of employees, although the pressure is brought against the employer. A *sympathetic strike* is a work cessation by employees seeking no concessions from their own employer, but lending their support to employees in another business who are seeking to force concessions from their employer. A boycott is a refusal to deal in order to force concessions. In labor disputes a *secondary boycott* is a concerted refusal to deal with persons who have dealings with an employer who is involved in a primary labor dispute. Some further discussion of these measures will appear in other portions of this note.

All of these incidents may occur in any type of dispute. They may coexist in a variety of combinations in the same dispute. They may be entirely absent. It is the dispute itself, however, that requires settlement. The nature of that dispute can be understood best by considering the areas of potential disagreement in labor-management relations. What are these general areas of disagreement? The following questions will suggest the answer:

(1) Does the dispute relate to the recognition of the union as the bargaining agent for certain employees or classes of employees?

(2) Does the dispute relate to the terms that shall govern the relations between an employer and his employees?

(3) Does the dispute relate to the application or interpretation of an agreement governing the relations between an employer and his employees?

(1) *Union Recognition.* A typical dispute concerning union recognition occurs when a union presents a demand to an employer, stating that his employees have designated the union as their representative for collective bargaining purposes, and the employer refuses to accede to the demand on the ground that the union is not authorized to speak for the employees. The National Labor Relations Act[2] and laws in some of the states provide a means of determining such controversies. If no law of this type applies, the parties are left to their own resources, and to the techniques of settlement which will be discussed subsequently in this note.

There are variations from the typical pattern, all involving a union-recognition question of some sort. For instance, a union may present a demand to an employer that he henceforth employ only members in good standing of that union, without asserting that any of the employees are members of the union or even that they desire the union to make the arrangement set forth in its demand. In an aggravated situation of this kind the employees may have already indicated their desire to be represented for collective-bargaining purposes by a union other than the demanding union, and there may have been an official certification of the other union by an appropriate governmental agency. The object of the pressure applied in the jurisdictional struggle thus precipitated is to compel the employees to change their union preferences by threatening them with the loss of their jobs. This was the situation which the President of the United States had in mind in his 1947 message to Congress on the state of the Union,[3] when he stated that the jurisdictional strike should be outlawed when it sought to compel an employer to deal with a union other than that certified by some governmental agency or otherwise legally designated by the employees themselves.

(2) *Contract Negotiations.* Disputes in the negotiation of contracts have to do with the basic framework which is to govern the relationship between an employer and his employees. Most of the recent spectacular strikes in basic industries have been outgrowths of this type of disagreement. The category includes not only disputes in the negotiation of an initial agreement or of any renewal of such an agreement, but also disputes concerning provisions of the contract which are subject to reopening and renegotiation during its term. For instance, the contract may run for a one-, two-, or three-year period, but it may provide that the question of wages may be reopened by either party at six-month intervals, or after thirty days' notice, or upon certain changes in the cost-of-living index, or upon certain changes in the price of a basic commodity vitally affecting the industry. Any of these con-

[2] 48 STAT. 449 (1935), 29 U. S. C. §151 *et seq.* (1940).
[3] 93 Cong. Rec., Jan. 6, 1947, at 135.

tingencies may lead to a "contract-negotiation" dispute. Also included in this area of disagreement are those questions which remain subject to negotiation because of the fact that the agreement neither resolves them nor furnishes a procedure for settling them.

It is contract-negotiation disputes which present the greatest difficulty to outsiders attempting to promote industrial harmony, and, as experience in 1946 has shown, it is these disputes which lead to the greatest loss of man-days in strikes.

(3) *Contract Interpretation.* The third area of disagreement concerns the application and interpretation of the collective agreement. From the standpoint of settlement this, in many respects, is the easiest type of dispute to deal with. More and more it is being recognized that such questions can be resolved through procedures established by the parties themselves. In many contracts provision is made for their ultimate settlement by arbitration. It should be noted that the interpretation of contracts has historically been a function of the courts, so that proposals that disputes in this area be submitted to a court or an arbitrator for decision do not involve any sharp departure from custom and tradition.

II

With this brief discussion of the types of labor disputes in mind, we may turn to a consideration of the approaches to settlement which are available to the parties and to representatives of the public. The complexity and variety of labor problems are such that any generalization or short treatment of this subject must be something less than the full truth. It is believed, however, that the following list includes all of the usual approaches to settlement of a labor dispute:

(1) Discussion and negotiation
(2) Conciliation
(3) Mediation
(4) Voluntary arbitration
(5) Investigation and fact-finding
(6) Compulsory arbitration
(7) Court action
(8) Legislation

(1) *Discussion and Negotiation.* Discussion and negotiation between the parties involved, without the assistance of any outside agency, is, of course, the first step in any effort to settle a dispute. If the dispute relates to union recognition, the employer may deem it inadvisable to enter into such discussions until certain preliminary steps have been taken (for example, until the union has been certified by the National Labor Relations Board). Discussion and negotiation with respect to the terms of a contract is encompassed in the term "collective bargaining," a process in which all parties—labor, management, and government—today proclaim

their belief. Adherence to the principle of collective bargaining implies willingness to seek in good faith a solution to the demands of the other party. Discussion and negotiation of disputes in the third category (contract interpretation) are usually conducted in accordance with grievance procedures outlined in the contract.

The success with which this approach is used in the solution of labor difficulties depends in a large measure upon the willingness and desire of the parties involved to achieve stability in industrial relations without recourse to outside agencies. The extent to which it is used successfully may, therefore, be regarded as an index of the maturity of the relationship between the parties, although it must be remembered that "immaturity" of only one of the parties to the relationship can defeat the attempt to work out problems through mutual discussion and reasonableness.

(2) and (3) *Conciliation and Mediation.* These two terms are discussed together because in the vocabulary of modern labor relations they are for practical purposes interchangeable. Conciliation denotes the intercession of an outside party who attempts to bring the disputants together and who encourages them to resolve the dispute. Strictly speaking, the conciliator may concentrate his powers of persuasion on one party alone. Mediation suggests a more positive and affirmative role for the interceding third party, and contemplates his dealing with both disputants. If original meanings were strictly retained, the process would correctly be called conciliation if *X*, being informed of the fact that *A* and *B* are in dispute, urges upon *A* and *B*, or either of them, the necessity and importance of resolving the dispute. The term "mediation" would be properly applied if *X* in this situation should work with both parties to resolve the matter, and present to both *A* and *B* a concrete proposal for settling their differences. This distinction, however, is of little current importance. It is well known that the United States Conciliation Service, for example, makes full use of the process here referred to as "mediation." Neither term connotes enforced compliance with the suggestions of the conciliator or mediator. Some statutes introduce an element of compulsion by requiring disputants to notify a governmental agency that a disputes exists, so that an opportunity for conciliation and mediation is afforded, or by compelling the parties to submit themselves to the process even though they remain free to disregard the recommendations of the mediator.

It would be interesting to discuss at length the techniques of conciliation and mediation. That they constitute an art to be mastered only through aptitude and diligence is demonstrated by the known proficiency of certain individuals, as well as by the established fact that the inept intervention of a well-meaning third party may frequently destroy such opportunities as do exist for bringing a dispute to a harmonious conclusion. Briefly, the conciliator or mediator can perform the function of clarifying for the parties the issues involved; he can perform the function of suggesting new approaches when the parties have grown stale; he can be used as an intermediary to whom the parties may reveal facts or positions which they are

unwilling to reveal directly to the opposing party. At times, the conciliator or mediator can provide technical data and draw on his experience in the industry, in addition to making suggestions based on his experience with the solution of similar disputes.

(4) *Voluntary arbitration* means that the parties willingly place the dispute before a third party with the request that he resolve it in accordance with the terms of the "submission" in which the parties have joined. The parties agree that the arbitrator's decision shall be binding on them. The submission may be *ad hoc* (that is, covering a single specific dispute), or the general agreement governing the relationship between the parties may include a provision that all disputes of certain types will be submitted to arbitration.

Arbitration is judicial in character, in contrast to mediation and conciliation, in which reliance is placed upon compromise and mutual concessions. The arbitrator is a judge. By their agreement the parties define his jurisdiction and the issues to be submitted to him. This agreement distinguishes voluntary arbitration from compulsory arbitration, which will be discussed below.

A dispute as to the negotiation of a new collective agreement may be submitted to arbitration by the parties, although this approach to settlement is more normally used in the contract-interpretation type of dispute.

(5) *Investigation and Fact-finding.* This approach to the settlement of labor disputes was approved by the President of the United States in his request for legislation in 1946.[4] The proposed bill[5] would have provided for the appointment of fact-finding boards with full authority to investigate labor disputes and to report their findings, but with no authority to force the parties to accept such findings nor to take any action based on the findings. The bill was not passed, but pursuant to Presidential order there was extensive use of fact-finding boards on an industry-by-industry basis in the period immediately following the abolition of the War Labor Board. This technique is appropriate, normally, only in contract negotiation disputes. It represents an extreme degree of third-party interference in the dispute between the parties, although it stops short of forcing acceptance of the findings upon the parties to the dispute. Advocates of this procedure rely upon public opinion to force acceptance. It is likely that this approach will prove more effective on a local and unofficial basis than in nationwide industrial disputes.

(6) *Compulsory Arbitration.* Compulsory arbitration is the requirement that disputes not otherwise resolved must be submitted to third parties for final and binding determination.

In disputes involving union recognition, compulsory arbitration has in effect been established for cases falling within the National Labor Relations Act. Furthermore, a great many contracts provide for the arbitration of disputes concerning their interpretation and application, and in affairs outside the field of labor relations

[4] H. R. Doc. 381, 79th Cong., 1st Sess. (1945).
[5] H. R. 4908, 79th Cong., 1st Sess. (1945).

it is quite common to compel contending parties to submit their disputes over the meaning of agreements to a compulsory process. Consequently, the use of compulsory arbitration in these two types of labor disputes involves no startling innovation. However, when we turn to disputes of the second type, relating to the negotiation of the agreement which is to govern the relationship between the parties, we encounter what seems to many an insurmountable obstacle to the employment of compulsory arbitration; for here arbitration means that a third party is called upon to say what the agreement between the parties shall be when the parties themselves have been unable to reach agreement. It is this fact which makes the contract-negotiation dispute the paramount one for study and consideration, as is evidenced by the number of articles in this symposium dealing with it.

Compulsory arbitration has become an emotionally charged term. Some seek to avoid the emotional connotations by suggesting "labor courts." Obviously such variations in terminology are immaterial except in a psychological sense. The nub of the question is whether or not the disputants must accept the decision of a third party when they have not agreed to be so bound. Requirements that parties give notice and postpone during a "cooling-off" period the use of their economic power to engage in a strike or lockout, that they submit their disputes to certain processes of mediation or to investigation and fact-finding before using such power, are measures which partake of compulsion, but they do not constitute compulsory arbitration unless coupled with the requirement that there be compliance with a decision imposed from the outside. During the recent war there was compulsory arbitration of labor disputes by the War Labor Board. Yet in the board's operations the semblance of voluntarism was preserved because it was founded on a national no-strike, no-lockout agreement reached by labor and industry representatives in December, 1941, in which it was agreed that all disputes would be settled by peaceful processes.[6] Even so, the War Labor Board could not enforce its own orders.[7] That had to be done under the war powers of the President.[8]

(7) *Court Action.* It is frequently urged that courts should resolve all labor disputes. It should be noted that such proposals involve compulsory arbitration. The mere fact that the third-party function is performed by a court does not relieve the process of its compulsory character, nor remove the basic objection in contract-negotiation disputes that a non-contractual solution is imposed upon the parties.

However, quite apart from proposals for extending the functions of courts in this field, it should be noted that the courts do play an important part in labor disputes even now, particularly in dealing with their external evidences. For example, action on the picket line may involve breaches of the criminal law. Civil damage

[6] See EXEC. ORDER No. 9017, Jan. 12, 1942.

[7] See National War Labor Board v. Montgomery Ward & Co., 144 Fed. (2d) 528 (App. D. C., 1944), *cert. denied* 323 U. S. 774 (1944).

[8] See U. S. v. Montgomery Ward & Co., Inc., 150 Fed. (2d) 369 (C. A. A. 7th, 1945), *vacated* 326 U. S. 690 (1945) on the ground that the cause had become moot.

suits may grow out of the same set of facts, and other union activities such as boycotts may lead to damage suits to be tried in courts. Injunctions against certain types of union activity were used quite extensively before the passage of the Norris-LaGuardia Anti-Injunction Act and its state counterparts. Questions with respect to the enforcement or meaning of collectively bargained agreements may be brought into courts; the courts may be called upon to determine the validity of arbitration awards, and so on. The generalization is still true, however, that the courts do not provide a medium for the solution of most basic labor disputes, and they perform no function whatever in grappling with the very difficult contract-negotiation dispute.

(8) *Legislation*. Legislation is listed as an approach to the settlement of labor disputes because through legislation certain disputes may be entirely eliminated or procedures may be provided for their settlement. Legislation providing settlement procedures, however, results only in requiring or extending one or more of the approaches previously discussed.

One of the most important pieces of labor legislation, and one which is prominent in current discussions of the problem of dispute settlement, is the National Labor Relations Act. This Act does not purport, however, to provide solutions or even formal precedures for the solution of major types of labor disputes. It affirms the full freedom of workers to organize and to designate representatives of their own choosing for the purpose of negotiating the terms of their employment and for other mutual aid or protection. As has already been noted, it establishes compulsory procedure for the settlement of one type of dispute—the union-recognition disagreement. It sets up legal machinery for the prevention of unfair labor practices which obstruct the function of collective bargaining. Its primary purpose is to insure the removal of impediments to collective bargaining, in the hope that through that process, negotiating freely and in good faith, the parties themselves may reach agreement. The Act does not attempt to prescribe the results to be reached, nor to impose solutions in those cases in which the method of collective bargaining fails to produce a settlement.

However, it is possible by legislation to deal with the substance of the employer-employee relationship and, by defining the rights and duties of the parties, to remove certain elements of that relationship from the field of economic contention. This is shown in a negative sense by those state statutes which forbid agreements establishing the closed shop or the union shop. The Fair Labor Standards Act[9] is another instance of legislation which cuts down the area of dispute. All employees covered by the Act must receive at least forty cents per hour, and time and one-half after forty hours per week. Agreement between the parties cannot validly effect any arrangement which would be less beneficial to the employees. Thus through legislation it is possible to take certain matters out of the hands of the parties entirely,

[9] 52 STAT. 1060 (1938), 29 U. S. C. §201 *et seq.* (1940).

or to circumscribe the area within which they can bargain and hence the area within which disagreements can arise.

. . .

From the great number of bills introduced this year in Congress and in the legislatures of the several states, it is obvious that many people believe that by "passing a law" the labor-dispute problem can be largely dissipated. Legislation can, indeed, be helpful, but it is hoped that this brief analysis has served to create some doubts concerning any easy, "over-night" solution to the problems here under discussion.

LOCAL AND UNOFFICIAL ARRANGEMENTS FOR LABOR DISPUTE SETTLEMENT

ARTHUR W. HEPNER*

In a recent interview an assemblyman from the Jersey City stronghold of Mayor Frank Hague said that the natural inclination of the American working man is to rebel and assert his independence when government tries to force sledge-hammer legislation on his back. His comment alluded to a New Jersey law[1] which confers on the Governor seizure powers to prevent strikes and lockouts in public utilities. It had, however, a broader application; he was expressing opposition to compulsory methods of any kind for settling labor disputes. Equally under the fire of his remarks were forced arbitration, deprivations of the right to strike, government wage-fixing at state or national levels, and other mandatory programs in which labor has no alternative other than to accept the dictation of an outside agency.

As an alternative to what he considered the sledge-hammer approach, the New Jersey legislator urged the development of voluntary forums. These forums might take various shapes. They might be labor-management conferences, community labor-management-public plans, or mediation services of a wholly advisory character. The important element is that they would give counsel rather than make final and binding adjudications without the specific consents of the parties in dispute.

Without realizing it, the gentleman from New Jersey skirted the new grass that has been growing up in many communities during the past few years. Dozens of the country's larger cities, aware of the need for industrial peace, have been groping, plodding and working to reduce the size of the dangerous area of disagreement which leads to work stoppages, strikes and lockouts. Their formulas differ; their goal is the same. Of the methods developed thus far, three are prototypes on which the others are variations. The basic plans are those of Toledo, Boston and San Francisco.

San Francisco's is an employer plan, unilateral, but the unions appear to like it. The Boston plan embraces labor and management; it is a bi-partite operation bearing no relation to the metropolitan government. Of the three, the Toledo plan alone brings in local government. The Toledo plan is perhaps the best known because its sponsors have seen to it that its story has received wide circulation. In fact, the work-horse of the plan, Jerome Gross, is a former newspaperman and has lent a hand in spreading the gospel through the various pipes of information.

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[1] N. J. S. A. (Supp., 1946) 34:13B-1 to 34:13B-17.

The conception of the Toledo plan took place in the spring of 1945. Resolution R 71-45 of the Toledo City Council, adopted on April 23, authorized Mayor Lloyd E. Roulet "to appoint a committee of eighteen, consisting of six representatives of management, six representatives of labor and six representatives of the public; for the purpose of studying community management-labor problems." The resolution asserted that full employment was the most important postwar problem facing the city; moreover, that full employment depended on narrowing the areas of disagreement between labor and management "through exploration by labor and management with the aid of the public of ways and means to effect a better understanding and solution of the problems affecting labor and management within the community." Unless the understanding was reached, the resolution warned, "we are faced with industrial strife and the consequent dislocations and economic losses to the community."

Ten months later the plan was born.[2] The survey undertaken in accordance with the 1945 resolution produced after a period of gestation what was called a "charter for industrial peace." In the week of Lincoln's birthday, labor and industry in Toledo presumably were emancipated from the bonds of industrial strife; the City Council unanimously approved the charter. Broadly speaking, the Toledo charter provided for a permanent committee of eighteen, embellished by an executive secretary and a full-time director of mediation, fact-finding, and arbitration.

The charter consists of six principles and twice that number of articles. Its brief preamble states: "Industrial harmony is necessary to the welfare of Toledo. Industrial harmony means more than the elimination of strikes, slow-downs and lockouts. It means a practical, common-sense recognition of the rights of both employers and employees, the mutuality of their interests, and the importance of their joint responsibility to the citizens as a whole, whose interests transcend the presumed rights of any group." The six principles declare that management recognizes employees' rights to join unions and bargain collectively; labor recognizes management's right to manage; neither labor nor management shall discriminate against any employee because of race, color or creed. Both agree that increased efficiency and technological advance mean lower costs and prices, wider markets and the likelihood of higher wages, a rising standard of living and increasing employment; both realize that differences and disagreements will arise, but agree that their damaging effects should be minimized by joint discussion and voluntary solicitation of mediation, fact-finding, and arbitration facilities to be made available by the Labor-Management-Citizens' Committee; and both agree that an educational program should be encouraged to promote better understanding among workers, stewards, union officials, supervisors, foremen, and managers. The twelve articles lay down the *modus operandi* for the committee. Repeatedly the assertion is made that participation in the plan is entirely voluntary.

[2] N. Y. Times, Feb. 17, 1946, p. 2, col. 2.

Toledo's plan was prompted by a long history of bitter industrial conflict which from time to time had been pock-marked by violence. In 1919 National Guardsmen fired on strikers at the Willys-Overland Company; in 1934, two were killed as the result of a strike at the Electric Auto-Lite Company. A Toledo Peace Board was formed with the participation of the American Federation of Labor, and some semblance of order was obtained. But with the establishment of the National War Labor Board early in 1942,[3] the need for the Toledo agency was dissipated and it was abandoned. However, Department of Labor statistics for 1944 indicated that 184,000 man-days had been lost in the city in that year because of work stoppages.[4] It became apparent to officials in Toledo that precautions were necessary to prevent labor and management from going back to the days of open industrial warfare after the war had ended. So city officials, headed by Vice-Mayor Michael V. DiSalle, advocated formation of the tri-partite committee as a part of the city government.

In its first annual report, covering the last six and a half months of 1946, the Toledo committee enumerated forty-three disputes which it had handled and said there had been no strikes since October 17. Between June 15, when the committee set up shop, and October 17 there had been sixteen strikes. In nine it worked out the settlement; the remaining seven were settled without its intervention. Percentagewise, the record is fair. Although nearly 40 per cent of the disputes which came to its attention reached the strike stage, it settled nearly 60 per cent of them. The committee claims to have averted twenty strikes and adds that in ten other cases the disputes were compromised after it had arranged meetings between union and management and recommended further negotiation. On one occasion, in a dispute involving the AFL Teamsters' Union, public members of the committee acted as arbitrators and rendered a final and binding decision.

Tests of the effectiveness of the Toledo concept became possible even before the committee was set up as a part of the municipal government. As the original survey was being made, CIO warehouse workers went on strike. They had been out nearly six weeks when the committee of eighteen decided to move in. The public members called in the union and employer representatives separately and apprised them of the damage the strike was causing to the community's welfare. Within seventy-two hours the strike ended. Another dispute in which the committee intervened was in a textile plant. Word reached the group that the union had planned a mass picketing demonstration in the center of the city on a Saturday afternoon. Vice-Mayor DiSalle, speaking for the committee, notified the management of the textile company that the projected demonstration could have serious effects on the city. He counseled the management to take steps to resolve the dispute. Meanwhile, one of the labor members carried the same message to the strikers.

[3] EXEC. ORDER 9017, Jan. 12, 1942.
[4] U. S. Bur. Lab. Stat., Bull. No. 833 (1945), 11-12.

They were back at work the following Monday. There had been no interference with Saturday's commerce and trade.

Another incident, in which the committee indirectly aided in a critical dispute, involved the Libby-Owens-Ford Glass Company. It was said that the "human association" of John D. Biggers, president of the company, with labor members of the committee resulted in the absence of animosity during the dispute. Although a strike was called, there was no picketing; labor committees were given access to the plants to make certain no attempts were being made to operate, and inflammatory rumors were promptly exposed. When the plant re-opened, relations between union and management were unusually good. Mr. Biggers, who is an industry member of the Toledo committee, and union officers sent a remarkable letter to employees at the end of the strike. Among other things it said: "We as officials of the union and the company are all thankful that the glass strike is ended. We will do everything possible in the future to avoid a repetition. . . . The company is glad to have you back at work in its factories. The union and each of you are assured of the good will of the company. The union likewise assures the company of its good will and co-operation. Co-operation between men and management will insure good production. Good production is the best possible insurance of good wages. You, the union and the company, are a team in this industry. We lose ground or succeed together."

The Toledo plan employs a useful, if unorthodox, technique, less politely known as the "back-door" method. It drops all pretense of formality and gets "the boys" together to talk over their grievances. The first step is initiated by the executive secretary. Notified of a dispute among participants in the plan, he summons them into an informal conference. If he cannot make headway in his office, over sandwiches and coffee, he recommends mediation, fact-finding, or, as a final step, arbitration. The disputants are not obligated to accept any of these recommendations, but the informal nature of the plan, together with the fact that its findings are made public, inclines labor and management to co-operate. Not all unions and companies in the community have joined the plan, for in many quarters there is some doubt as to its value. Obviously, the committee can work only with affiliated unions and managements; it cannot hope to make any impression on groups which deny its validity.

The theory behind the Toledo plan is that through regular meetings of the committee labor and industry members will get to know each other and develop a mutual understanding of each other's problems. On the basis of the confidence developed, it is assumed, they will be able to work out with the public members methods for maintaining a high level of industrial peace. Through tri-partite collaboration it is expected they will reach conclusions and recommend policies designed to promote the welfare of the community.

Other cities have inquired about the plan. The first report, in addition to citing

statistics of results, recalls that requests for information have been received from 225 city and state officials. Among the cities which have considered introducing their own versions of the Toledo plan have been St. Louis, Denver, New Orleans, Milwaukee, Tulsa, Kansas City, Detroit, and two Canadian cities, Montreal and Windsor, Ontario. Moreover, the United States Conference of Mayors requested that data regarding the plan be sent to 550 city administrations.

Louisville, Kentucky, inaugurated a plan modeled after Toledo's in July, 1946. Its committee is composed also of eighteen members, giving equal representation to labor, management and the public. The day following the inception of the plan city garbage collectors belonging to a CIO union struck for higher wages, adjustment of grievances, and union recognition. Although city officials conceded the justice of the wage demand, city coffers lacked funds to meet it. The new committee, attacking the problem, ascertained that a reshuffling of the Sanitation Department's budget would permit an increase of 12½ cents an hour. Five days later the men were back at work assured of union recognition, in return for which they pledged to refer future disputes to the committee for settlement. The Louisville committee met other challenges with equal acuteness and avoided, among other threats, a proposed general strike by the AFL over the city's denial to policemen of the right to organize.

Unlike Toledo's, the Louisville committee is not an adjunct of the municipal government. It is a completely independent body. One criticism lodged against it is that its public members should, according to the logistics of the class struggle, incline toward a management viewpoint. The public membership includes Mark D. Ethridge, publisher of the *Louisville Courier-Journal,* and Charles W. Williams, head of the economics department of the University of Louisville. Both, as well as other public members of the committee, are men of broad, liberal vision. Labor and management have found their counsel impartial and the unions as well as management have heartily endorsed the Louisville plan.

Of the cities which have investigated the Toledo formula, only in St. Louis have the unions turned a cold shoulder toward it. Here both CIO and AFL central bodies have denounced the plan and refused to participate in it, even to the extent of prohibiting members from engaging in preliminary discussions. In the case of the AFL, the rejection resulted from internal politics. The central trades and labor union originally voted to designate representatives to attend the exploratory talks. But a week later, business agents of the AFL unions cancelled out the rank-and-file mandate by voting to abstain from any conference on the subject.

The CIO was more unified. CIO held that the United States Conciliation Service and the National Labor Relations Board adequately answered the needs of labor and management. Rather than the creation of another agency, it advocated a strengthening of Conciliation Service and NLRB facilities. On the basis of its previous experience during the war with a labor-management committee under Mayor

Kaufmann, the CIO had little faith in a community plan. It contended that the Mayor co-operated superbly when trying to increase output for management or induce new industries to enter the city, but charged him with shutting the door in CIO's face when it demanded the committee's aid in obtaining severance pay for discharged war workers, union recognition, settlement of grievances, or other goals sought by organized labor. CIO's attitude was epitomized by a declaration that labor had better beware the attempt to stampede it into peace plans which must ultimately lead to compulsory arbitration. Whatever the merits of this position, the refusal of CIO and of AFL to co-operate with the Mayor doomed the plan for St. Louis.

In the District of Columbia the Council of Social Agencies recently advocated a Toledo-type plan. Its recommendation called for creation under the District government of a voluntary committee, tri-partite in composition, to reduce the number of strikes and to promote amicable industrial relations. Most of the disputes arising in the District, the council noted, were purely local and required local machinery for settlement. No such machinery had been available. When intervention became necessary in a hotel strike, it was Reconversion Director John R. Steelman who had to mediate and work out the settlement. In contrast to the CIO view in St. Louis, the Washington group considered the United States Conciliation Service inadequate or unsuitable for coping with local disputes. The same day that the council made its recommendations, the Gallup poll reported that 52 per cent of persons interviewed on the Toledo idea thought such a plan would work in their own communities. On the negative side 23 per cent thought it was impractical, while the middle 25 per cent had no opinion on the subject.

Shortly after the council's recommendations were made public, the United States Conciliation Service created a 24-man Labor-Management Assembly for five Middle Atlantic states and the District of Columbia.[5] This body, composed of ten management representatives, five representatives from each of the two major labor organizations, two corporation lawyers, and two labor lawyers, will act in an advisory or mediatory capacity in disputes of national or state-wide importance. The Assembly will assist the Conciliation Service just as management and labor members of the Toledo committee aid the executive secretary in softening up the disputants for mediation. States in the group are Pennsylvania, Maryland, Deleware, southern New Jersey and Virginia.

The Conciliation Service project, however, bears a closer resemblance to the Boston formula than to the Toledo plan. It is primarily bi-partite in structure, with the public represented only by the member of the Conciliation Service who acts as impartial chairman of the group at its full joint meetings. A clearer glimpse into its future workings may be had by an analysis of the structure and operations of the Industrial Relations Council of Metropolitan Boston.

[5] 19 L. R. R. 86-87 (1946).

Boston, the cradle of this country's first native political institutions, claims the distinction of having developed the first general community program for settlement of labor-management controversies that entirely rules out government participation. Its plan was conceived in 1940, and after a year of preparation was ready for business on the eve of Pearl Harbor. It grew out of a desire of the Industrial Relations Committee of the Boston Chamber of Commerce to enlarge the body by inclusion of labor representation, but the natural suspicion of labor men against a Chamber of Commerce taint led to the formation of an independent agency.

In its final form, the plan provided for an executive committee of fourteen members to run the affairs of the council. Of the members of the Executive Committee, six represent management, three the AFL and three the CIO. The other two are a public member—at present President Daniel L. Marsh of Boston University—and an executive secretary. Members of the council are business and industrial firms and labor unions which desire to affiliate. The operating expenses are paid out of membership fees which are $10 annually for local unions and from $5 to $75 for employers, depending upon the number of persons they employ.

The nub of the program, in the tradition of New England's hallowed town meetings, is talk. The council encourages the talking out of mutual problems at mass conferences, periodic committee meetings, and on a weekly radio program. Subject-matter covers a wide gamut, from individual union practices and collective bargaining to administration of contracts and joint political action on issues of mutual interest. The main attraction annually is a one-day conference of labor and management, addressed by labor, management and public figures of national prominence. Smaller conferences are sponsored during the year by the CIO, AFL and management groups respectively, and are restricted to attendance by members of the sponsoring factions.

These get-togethers are but the trappings. The real operations of the council are carried on through frequent meetings of the executive and subsidiary committees, at which small and intimate groups of labor leaders and businessmen cultivate the practice of unravelling mutual problems harmoniously. There are also the day-to-day activities of the executive secretary. The executive secretary serves as a general factotum and, when necessary, as dulcifier to dyspeptic union representatives and plant managers. On the telephone or in conference, it is his job to use tact and knowledge of human beings and labor relations "to destroy the mustard seed before it begins to germinate."

He works along these lines, which are somewhat similar to the technique used at Toledo: A union representative complains of unreasonable obstinacy from a given firm. The executive secretary communicates with the head of the firm, directly if he knows him personally or through the help of a mutual friend who usually turns out to be a member of the executive committee. He tries to bring the disputing parties into his office or into a meeting at some other place where the three of them

"talk things over." The same procedure is followed when management complains against a union, because the policy and method is admittedly to exploit personal relationships. Not always, however, does this "talk-things-over" approach succeed. When it fails, the council provides complete conciliation, mediation and arbitration facilities. These services are supervised by a conciliation subcommittee which is composed equally of labor and management men. It makes available one-man, bipartite, or tri-partite panels on request of the disputing parties. But the entire operation is wholly voluntary; the council has no power but that of persuasion.

By and large, labor and management in the Boston area endorse the program. Notable exceptions are the left-wing elements in the CIO. Although local officers co-operate individually with the council, the left-wing organizations boycott it. This abstention has been attributed to the abhorrence with which Communists and fellow-travelers regard the development of labor-management programs impeding access to the government. The council has been impotent, its members admit, in the face of national strikes or in disputes in which its intervention is resented by either labor or management. It can operate efficiently only as a voluntary body and upon the direct solicitation of the disputants. Even if the executive secretary attempts to set up a meeting between disputants there can be no successful stride made toward compromise unless both labor and management agree to enter the meeting.

One practical view applicable to all voluntary and unofficial dispute-settlement programs has been advanced by the present chairman of the Boston council, Frederick W. Bliss, an industry member of the executive committee: "The problem is to get common sense into everyday plant relations. This means labor and management must be taken away from the heat of a plant disturbance to learn that the other fellow is human, too. Labor and management must meet, moreover, at times other than when disputes are in progress; this idea of meeting the other side only when there's a fight has been the cause of too much trouble in the past." It was Bliss who, as head of the Boston Chamber's Industrial Relations Committee, gave the impetus to creation of the Boston plan. The record shows that in the year following V-J Day, arbitration was requested in only four cases, and in these, as well as in the several cases informally conciliated, settlement was reached without a work interruption.

More than 3,000 miles west of Boston, the third basic type of plan was developed in 1939 at San Francisco. It is an Employers' Council, dealing with organized labor from the standpoint of the community's welfare as a whole. San Francisco with its record of brutality in labor relations and its general strikes needed some relief from violent industrial embroilments. An Industrial Council, prior to 1939, was generally considered a "union-busting" organization.[6] Its anti-labor sentiments

[6] In 1923 a United States District court held that the Industrial Association of San Francisco, in seeking to enforce the so-called "American plan" in the local building industry, was engaged in a conspiracy in restraint of interstate commerce in violation of the Sherman Act, and issued an injunction at the instance of the Department of Justice. Builders and contractors were required by the association

led Roger Lapham, then a steamship company executive but now Mayor of San Francisco, to propose "that the employers of San Francisco develop some kind of federation with the idea of honestly trying to establish better relations between employer and employee." Out of this recommendation the present council grew. It resembles a trade council in structure.

It has two kinds of members: industry groups and individual employers. Of all industries in the city only the building construction industry, which has its own dispute settlement machinery, has not joined the council. There are about 2,000 members. In addition to a board of directors which formulates policy, the council has a professional staff of thirty-six economists, lawyers, negotiators, and researchers, headed by William G. Storie, executive vice president.

The basis of the council's dealings with organized labor is a master contract. This is believed by the members to be a contract in the best interests of all the employers in a given group and their employees. Both sides must live up to it. If a union takes action against any member of a group of employers in violation of its contract, the council calls for a lockout in all plants belonging to the group. Contrariwise, if an employer violates the contract, he becomes subject to strict disciplinary action. No member of the council is empowered to make any offer to his employees which is not in conformity with industry-wide practice. Should a member desire to make an innovation, he must present it to the council for consideration and a decision of the professional staff which is binding. The penalty for violation by an employer is expulsion from the council, and this, in more than one case, has forced employers to sustain heavy loses through boycotting by labor, industry and other groups.

As in Boston and Toledo, the formalities are merely the frosting. The real work is done by way of the "back-door" method. In an informal setting, the question of a wage demand is reduced from "What are you asking?" to "What do you want?" The professional staff knows all the ins and outs of negotiating and there is neither need nor desire for intellectal sparring. The staff member and the union representative can get right to the point. As Storie put it to Ted P. Wagner, a reporter of the St. Louis *Post-Dispatch* investigating the San Francisco plan, "We get the baloney out in a hurry, and get down to facts." When contracts are under discussion two union men and two council agents negotiate. If they cannot reach a decision, the members of this group select an impartial arbitrator whose decision is binding.

Regardless of conflicting opinions of the council,[7] its record is noteworthy. Be-

to obtain a "permit" to purchase certain materials; the permit could be obtained only if the contractor pledged that he would conduct his business according to the plan. U. S. v. Industrial Ass'n of San Francisco, 293 FED. 925 (N. D. Cal. 1923), *rev'd* 268 U. S. 64 (1924) on the ground that the effect on interstate commerce had not been sufficiently established. [Ed.]

[7] Caution and a thorough investigation of the details of the plan would appear to be in order before it is imitated by other groups. The case of U. S. v. Industrial Ass'n of San Francisco, 293 FED. 925 (N. D. Cal. 1923), cited *supra* note 6, suggests the danger that concerted action by employers to enforce

tween 1939 and 1944 strikes throughout the nation increased 52 per cent. But in San Francisco during the same period they declined 80 per cent. There were only eight strikes in 1943, involving 3,377 workers. In 1944 there were a dozen strikes, but they involved only 1,316 employees. Nevertheless, the council has encountered some difficult situations. Storie admits it took an "awful licking" in 1941 when seventy-seven restaurants were shut down for seven weeks by a culinary workers' walkout. Storie does not contend that the council can doctor all labor's ills. In his opinion, it happens to be tailor-made for San Francisco, but there are many other places in which it would not succeed.

Apart from the municipal programs, several states have taken various steps to cope with industrial difficulties. New York,[8] New Jersey[9] and other states have developed their own mediation agencies, supplementing the services of Federal agencies. Illinois[10] and other states have conciliation services. Many governors in messages to their legislatures have taken cognizance of the need for voluntary state programs.

The New Jersey State Board of Mediation may be taken as typical. This agency was created in 1941. It is an adjunct of the state Department of Labor and, except in disputes involving public utilities, provides a voluntary service. The board consists of seven men, two representing labor, two representing management, and three representing the public. Board members render services on a per-diem basis, but the budget provides for a full-time staff of four mediators and several clerical employees. The law creating the agency authorizes it to endeavor to prevent threatened work stoppages and to try to settle disputes which cannot be resolved by the parties themselves. When a dispute arises the board may intervene through its representatives on its own motion or upon request of either of the disputing parties. The nature of its intervention is left to the discretion of the staff. There are many alternatives: board representatives may stage "back-door" conferences, or they may try to bring the disputants together into a formal meeting at the board's offices. In effect, the board's representatives use the tactics of conciliators or mediators, and, in an impasse, may recommend arbitration. In that event, the board supervises selection of the arbitration panel, which must be constituted on a tri-partite basis. The board can only make recommendations; it cannot compel the parties to accept them. But like the various municipal agencies, it has the weight of public opinion solidly behind it.

Early in 1946, the New Jersey legislature strengthened the hand of the board for

adherence to a common labor policy through the use of boycotts may violate anti-trust laws. In addition, such plans may involve violation of §8(5) of the National Labor Relations Act if the terms of the agreement prohibit bargaining by employers concerning matters within the statutory obligation to bargain collectively. The question is presented in a case now pending before the National Labor Relations Board, involving the Hawaiian Employers' Council, which is said to have been patterned after the San Francisco plan. Matter of Shell Oil Co., 23-C-40. See also *Collective Bargaining With Associations and Groups of Employers*, 64 MO. LAB. REV. 397 (1947). [Ed.]

[8] N. Y. LABOR LAW §§750-758.

[9] N. J. S. A. (Supp., 1946) 34:13A-1 to 34:13A-13.

[10] ILL. STAT. ANN. (Jones, Supp. 1946) §§109.020-109.030.

coping with disputes in public utilities.[11] It required public utilities and their unions by law to negotiate before an "open window" with the board looking through. Specifically, utilities and their unions must notify the board of intentions to negotiate or renegotiate contracts, simultaneously with notifying the other party. If the unions and the utilities are unable to come to agreement or are unwilling to submit the unsettled issues to arbitration by the time the contract expires, the mediation board moves in. It sets up fact-finding panels of a tri-partite character and directs them to schedule public hearings. The findings of the panel together with recommendations are reported to the Governor, who, if a strike or lockout is likely, may seize and operate the utility. In all this there is a voluntary element; at present the board and the Governor are powerless to compel union or utility to accept the findings or to penalize workers who strike following seizure by the state. They rely solely on powers of persuasion buttressed by public opinion. There is on foot, however, a movement in New Jersey to add penalties to this public utilities bargaining law.

In his message to the Eightieth Congress, President Truman urged creation of a labor-management conference to assess the need for new labor legislation on a national scale. While the recommendations of the conference presumably would be enacted into law, they would have an element of voluntarism in them to the extent that they might be espoused by representatives of labor and management. Some states, including New Jersey, are contemplating the convocation of similar conferences. And at the recent United States Conference of Mayors held in Washington, Mayor Hubert H. Humphrey of Minneapolis expressed the belief that since committees had worked for him on everything else—taxes, health, housing, and traffic—they should be able also to help in the settlement of labor problems. He was confident that solutions could always be found by getting people to "sit on the inside."

The establishment of home-grown voluntary dispute-settlement plans has the endorsement of Reconversion Director Steelman. He believes they would accomplish what Government agencies at the national capital have been trying to achieve for some time, "to keep the country from asking Washington to settle local industrial problems." These plans, Steelman thinks, put the responsibility for industrial peace where it properly belongs—on the local community. Rather than impede, they augment the United States Conciliation Service, which is always available if the local agency fails. Mr. Steelman thinks he can claim credit for a part of the idea underlying the Toledo plan. When he was chief of the Conciliation Service, he instituted the practice of assigning permanent conciliators to various cities throughout the country. Before that, conciliators moved in from Washington as individual disputes arose. By assigning conciliators to live in a given community and become active members of that community, Steelman enabled them to learn

[11] N. J. S. A. (Supp., 1946) 34:13B-1 to 34:13B-17.

about local conditions and make friends among labor union and management officials. This friendship, he has said, paved the way to quicker settlements when the conciliators were called on to intercede in disputes.

An important factor supporting these voluntary plans is public opinion. In most cases officials work closely with the press, and they can "blackjack" a union or a company into acting in the interests of the community as a whole by threatening to give all the gory details of the dispute to the press. At the plan's command, also, generally are religious and civic agencies which can be enlisted to make the disputants come to reason. There is a host of other pressures accessible, if needed.

Admittedly, these voluntary and unofficial plans sometimes resort to extremes to protect the public interest. This poses a problem in ethics. Should the operating body think first of the private rights of the small group? Or should it endeavor to suppress that private right in the interests of the larger community? If its action is predicated on a philosophy of the greatest good for the greatest number, then it may justifiably take extreme steps against recalcitrant unions or employers. It will not be guilty of violating the trust placed in it. Nor will it be guilty of overstepping the boundaries of voluntary action. Instead, it will be acting in the long-range interests of the community and of the union or management involved because, by promoting industrial peace in this way, it will obviate the need for "sledge-hammer" legislation enacted by a Congress inclined to be hostile toward organized labor. Labor and management, with official or unofficial aid from the local communities, will have to develop voluntary dispute-settlement programs that will work, or endure the mercy of Congressional legislation.

REDUCING FRICTION IN EMPLOYER-EMPLOYEE RELATIONSHIPS

BENJAMIN M. SELEKMAN* AND SYLVIA K. SELEKMAN†

I

Friction constitutes a pervasive phenomenon in shop relationships. It has, however, received little attention. Concern has centered almost exclusively upon the more familiar and often dramatic "labor dispute." Frictions and disputes, of course, are closely related. Both constitute forms of human behavior—negatively charged behavior—within a specific work environment. Both have their causes, because all human behavior is caused—motivated—by a multiplicity of subjective and objective factors.

But these two related forms of shop behavior also differ one from the other. A dispute represents behavior that has crystallized into a concrete incident. It is embodied in demands, issues, or complaints; it is handled by defined procedures; it is ended by a "settlement." In a word, the conflict, dispute, grievance, or even difference has been formalized. It has become a discrete episode, precipitated out of the continuous flow of shop relations for resolution within a framework of law and custom—the so-called grievance machinery—or by bargaining across the negotiating table, or by a test of strength.

Friction, in contrast, comprises the whole matrix of precursor-behavior that may eventually produce an explicit "dispute." It is fed by all the negative currents of feeling and sentiment entering into the continuous flow of shop relations—the resentments, fears, suspicions, and antagonisms arising in daily dealings in particular shops and stores and mines and mills. Friction contains the ingredients of conflict before they have crystallized into the overt clashes termed disputes.

Friction in the shop thus belongs clearly to the unceasing interaction of management and men in daily work. It portrays a continuing aspect of the dynamics of industrial behavior. The episodic character of disputes, however, makes it unfortunately easy to detach each controversy from its whole context. Indeed, the very pressure for disposing of the specific issues to which a dispute has been "reduced" strengthens the tendency to isolate the incident from all that has preceded and all that will follow it.

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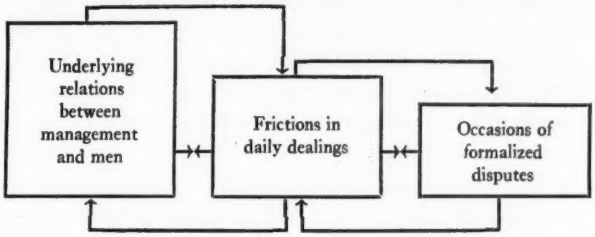
Yet only attention to the dispute, and not the dispute itself, can be detached from the continuing relationships that constitute its context. So dynamic, in fact, are the ties connecting both frictions and disputes with underlying shop relationships that the three are best understood as an integrated sequence in which each emerges as cause and result of the other. Thus the quality of relationships existing in a given shop at a given time determines the degree of daily friction between management and men; such friction in turn precipitates the conflict and controversy we term "disputes"; while the handling of these disputes determines whether or not sharpened resentments and antagonisms will be carried back into the shop, to intensify the frictions of daily working together, and thus to agitate further the atmosphere of joint dealings. A crude diagram indicates the circular flow of influence:



In this dynamic perspective friction in employer-employee relations affords a highly revealing symptom. It offers an index both of the fundamental state of health in the shop community and of potential outbreaks of overt conflict. It is an index, moreover, almost always available in greater or lesser degree. For the important thing to realize about friction is its inevitability. In social as in mechanical operations, it emerges the invariable resistances—one to the other—of bodies in related motion; in the shop as in all social institutions where men combine to promote life-goals, frictions arise from the sheer relationships by which men move forward or act together. Even such dominantly co-operative institutions as the family, the church, the school, are not immune from frictions and the sporadic conflicts they generate. Shall more be expected amid the tensions of modern industry?

II

The sparks that fly whenever men must act together in pursuit of their own goals are struck in the first instance by the clash of individual aspiration and achievement in the inevitably joint enterprises of social living. Man himself constitutes the first component in friction; it rises in the capacity for hostility he brings to situations in which he feels himself balked. This capacity roots deep in the human endowment. It belongs, in its biologic origins, to the basic protective devices equipping the human animal for survival. For the prime emotions in the constellation of related feelings and ideas that produce hostility are fear and anger—the fear which before

danger mobilizes an organism for flight and escape, the anger that mobilizes it to fight and resist.

Patently, however, the present-day world seldom confronts man with the physical dangers of primitive times. The threats in modern industrialism rise predominantly from the social relationships by which alone man can survive in it. These relationships, from infancy throughout life, yield both the means for satisfying *and* the obstacles impeding full gratification of wants. The positive and negative aspects of relationships—their character as instruments of, and curbs upon, human cravings—explain the contradictory impulses they evoke: the ambivalence of affection and hostility in the family, organizational loyalty and factionalism in the fraternal association, consecration and revolt in the church, friction and collaboration in the shop.

The wants for which the individual seeks satisfaction possess social as well as biologic determinants. Food is an elemental need; but the type of food any given man finds satisfactory reflects the customs of his culture, the gustatory predilections of his family, the standards of his class, the ambitions for advancement symbolized by ability to purchase foods deemed "better" in his society—and, as the line of interaction turns back, the peptic ulcers or other illnesses he may acquire under the stresses and strains of the struggle to "get on"! And so with other needs and cravings.

In their turn the obstacles rising in the way of satisfactions and life-goals may be internally or externally generated. The pay-envelope earned on the job, for example, with which the individual purchases these multiply-determined goods and services, may never seem sufficient to maintain him in the style to which he aspires. But its inadequacies too will almost always prove overdetermined—a resultant of many varying influences rather than of any single or clearly objective one. Even when earnings *are* inadequate, as, for instance, in a substandard industry, or in a depressed region, or on short-time, or during a period of inflated prices, the tensions of the real pinch are accentuated by contrast of the wage-earner's lot with the vaunted American standard of living, with the position of workers in higher-wage industries, or with family ambitions. In the same way, even when subjective inadequacies contribute to low earnings—lack in skill, personality handicaps, neurotic difficulties—once more the environmental pressures that induce high aspirations sharpen the resulting discontents. Just so the able, superior man, quite as much as the average American who is far and away the highest-paid worker in the world, seldoms feels he is getting all he needs or deserves.

III

The American, in a word, descendant of forbears with the drive to uproot themselves in search of a new life deemed better than the old, is now also child of the society thus built, with its prestige values attached to material success, and its competitive urges to do as well as or better than the next fellow. Pushed and

pulled by a multiplicity of internal drives and external pressures, he brings to his job all those concentric circles of relationships of which he is so integrally part and which are so inextricably part of him—family, kinfolk, age-group, neighbors, union fellows, church brethren, culture-complex, etc. To satisfy the varying expectancies revolving about him within these circles of relationships, he looks for certain job-returns. By the sheer fact that he spends a good part of each day on the job with other men, he becomes part of still further relationships. These shop relationships in turn bring satisfactions, or tensions and discontents.

Manifestly an obstacle to individual gratification rising anywhere in this intricate chain of relationships, reaching from outside the shop to the job and back outside again, may underlie shop friction—and then disputes. Wherever they arise, however, such obstacles reflect the social complexities of present-day living: they present themselves as unsolved problems or frustrating situations or conflicting urges. The specific forms of resistance and aggression they then evoke within the shop take on the characteristic impress of its relationships. The familiar slow-down, for instance, so troublesome an expression of shop friction, represents a protective device of the group, enforced by various group compulsions, against individual fears of working oneself out of a job or into a rate-cut, and so into hard times in the home—a complex response to a complex danger spelled out on some uncanalized line of communication that transmits the suspicions crystallized out of varied work experiences. In the relationships binding employer and employees, in a word, the frustrations and conflicts evoking hostile impulses find outlet in the resistances that comprise shop frictions.

The formation of these relationships begins with the moment an individual is placed upon the payroll. For he is then also placed in a defined position in relation to all the other people in the shop. Numerically most of them work at the base of an authoritarian hierarchy. They are "subordinates" who must take orders from, and satisfy by their performance, a "superior" immediately "above" them. This "superior" in turn also takes orders from the man "above" him in the line of authority.[1]

The authoritarian character of the shop derives, of course, from the very nature of modern industry. When finished goods are produced by assembling many separate parts turned out by many different workers, when those goods reach the consumer through the departmentalized functions of purchasing, engineering, production, accounting, selling, etc., the chain of activities manifestly requires continuous direction. Only a disciplined work-community can turn out goods under such conditions. Technologic industry itself makes imperative the need for the authority by which management imposes its commands upon workers.

These technical justifications of management's "rights" to manage, however, do

[1] BURLEIGH B. GARDNER, HUMAN RELATIONS IN INDUSTRY (1945) 1-64; GARDNER, *The Factory as a Social System*, c. II in WILLIAM F. WHYTE (ed.), INDUSTRY AND SOCIETY (1946).

not mitigate the *human* tensions and resistances induced by the exercise of these "rights." It is true that the manner of exercising authority exerts important influence upon the responses to it, just as it is also true that the capacity to accept authority and submit to disciplines imposed from "above" varies from man to man. But generally the sense of imposition evokes resentments. Only when he who takes orders feels some identification with him who gives them—when he shares common codes and goals—does authority become acceptable and discipline merge into self-control. American workers, and their superiors, all usually want to "make good" as individuals on their job. Typically they need the job to support themselves and their families; they want to earn "more"; they hope to advance and "get on." But the measure of their success is defined by the judgment of an immediate superior. How that superior feels and acts each day, what he says and how he says it, what he might have meant by what he says, what he might think about something that may have gone wrong—all become matters of intense concern to the "subordinates" on the job.

The prime significance of these job relationships explains the pervasive suspicions of "favoritism"—suspicions that have played a long familiar part in creating shop frictions. Whenever an individual fails to derive all he desires within a given relationship, he easily ascribes the frustration to favoritism. Even in the family a child may feel sharp jealousy of a sister or brother to whom parents seem partial. Not that the "boss" may never be guilty of favoritism; but just as often the suspicions may represent nothing more than suspicions—an index of dissatisfactions and frustrations in the relationship with a superior upon whom so much of vital importance depends.

Job content may further aggravate tensions and discontents. For great numbers the job is physiologically and psychologically unsatisfying—a barren, boring stretch of monotony. Yet too often the boss spurs the drive for "efficiency" by every possible incentive but the effort to make work itself interesting. And thus it is that the magnificent tools of technologic industry evoke no sense of personal pride and identification in the men who use them; while the magnificent mastery over nature these tools have yielded fails to impart any sense of the individual effectiveness that proverbially has constituted a potent reward to man for the toil and sweat of labor. This lack of intrinsic satisfaction in work is easily transformed into resentments against the boss who must keep the worker at it.

Nor, unfortunately, does "keeping him at it" possess even the mitigation of permitting a man to settle comfortably into familiar, accustomed grooves. For change, however erratic its rate in any given shop, is the one sure constant in modern industry, embedded in the very nature of technology. Only continous improvements in techniques and methods make possible a steadily rising standard of living. Recurrently such changes may spell economic disaster to the men directly involved: displacement, dilution of skill, decline of earnings. Quite understandably, therefore,

any projected shop innovation may easily evoke the fear and sense of threat that mobilize resistance, and so generate frictions between management and men.

And not only technologic change but all change, sheerly as change, creates dislocation and disturbance. A new top management sounds an alert throughout the structure of shop relationships, until all levels in the hierarchy of authority, from the working ranks up, have determined the manner of men who have taken over "headquarters." The appointment of a new foreman sets up its interacting pattern of initial tensions as the men whom he will supervise warily take his measure, while he himself braces to make good on his job. Even the appearance of a new worker at the bench may unloose a chain of negative responses. Those already on the job size up the newcomer to determine whether he will play the group game; the newcomer for his part feels the typical uneasiness of a stranger entering any settled or going association. For employees, just as men combined in any organized activity, tend to cross the formal lines of association with spontaneous allegiances. Workers at the bench do not function as discrete individuals solely in the shop positions to which they are formally assigned.[2] Instead they coalesce into small bench groups, united for resistance—maintenance of a standard day's work, slow-down, rejection of an innovation, covert struggle against whatever or whomever the group fears and dislikes—or, though unfortunately far less often, for zestful work co-operation.

Upon this structure of shop relations with its group codes, its systems of values and beliefs, its symbols of rank and role, its "cake of custom" as well as its rules of law, the larger outside community impinges unceasingly and inescapably. Legal reform, union organization, urban problems, general social upheavals form swift currents of external influence that beat upon the going shop community. In contrast to the adjustments demanded of workers by internal innovations and shifts, it is management that usually finds itself on the receiving end when these external forces buffet a shop. Under their impact the employees or their spokesmen—political as well as union—seem the aggressors against customary usage and "right" ways of behaving. We are still close enough to the ferment of New Deal reform, of swift union growth under the aegis of the Wagner Act, and of the spread of socialist and communist economies in our war-devastated world to realize vividly how emotion-loaded these great social changes have been for management. And just as workers project their uneasy fears, their sense of unmerited injury in changing shop relationships, upon industrial authority, so management displaces its hostile impulses upon the union "boss," the labor "monopolist," and "ungrateful" employees. Where one side denounces Congressional "reactionaries" and the "bour-

[2] See ELTON MAYO, THE SOCIAL PROBLEMS OF AN INDUSTRIAL CIVILIZATION (1946), chaps. 1-2; F. J. ROETHLISBERGER and WILLIAM J. DICKSON, MANAGEMENT AND THE WORKER (1939) pts. IV and V, 379-604; BURLEIGH B. GARDNER, HUMAN RELATIONS IN INDUSTRY (1945) 65-95; JOHN B. FOX and JEROME F. SCOTT, ABSENTEEISM: MANAGEMENT'S PROBLEM (Harvard University Business Research Studies, No. 29, 1943); ELTON MAYO and GEORGE F. F. LOMBARD, TEAMWORK AND LABOR TURNOVER IN THE AIRCRAFT INDUSTRY OF SOUTHERN CALIFORNIA (*Id.*, No. 32, 1944).

bons," the other fulminates against "that man in the White House" and the Washinton "bureaucrats."

It has been through the entry of "outside" unions into hitherto unorganized shops during the past decade that the most pronounced seismographic shocks have been registered throughout industry, precisely because labor organization and collective bargaining effect a profound social change in the established shop community. The ferment and frictions so commonly experienced in the initial stages of joint dealings are an index of the deep-reaching dislocations consequent upon this transition.[8]

For the basic structure of authoritarian relations has been shaken. Foremen and supervisors generally feel their established shop roles threatened; management mobilizes to defend from the ever-encroaching "usurper" the prerogatives deemed essential to effective performance of its industrial role. In truth, the familiar "right" to give orders from "above" to the "ranks" has been made subject to new "rights" of scrutiny and challenge. Those empowered to apply the new rights occupy newly created roles in the now branching lines of authority: shop stewards, union field representatives, union headquarters officials. They function under jointly formulated codes of shop law embodied in the collective agreement. The union organization, with its history, traditions, and current modes of behavior crystallized out of the specific group experience, takes its place beside the company organization as a constituent part of the whole structure of shop relations. The union factions operating within the union organization supplement the bench—and office—cliques functioning within the plant. The entry of the union neither creates these shop groups, nor does it dislodge them; although they too may now be variously transformed by assimilating into their cohesive clique associations the systems of belief and the new instrumentalities of unionism. At any rate, if frictions stem from the negative impulses evoked within the structure of relationships binding management and men in any shop, so profound a transformation of that structure as the entry of a union entails understandably intensified friction until the new relationships have become the accepted, customary ones.

IV

To spell out the dynamics of shop relations in such detail for an analysis of friction involves its hazards. Such formidable causative factors may make the requirements of dealing with problems of friction appear overwhelming. Yet the adamant fact remains that nothing less than full understanding of these complexities can serve the needs of effective policy. If, in a word, shop frictions are functions of shop relationships—of the hostile impulses evoked in men by their typical activ-

[8] For an extended treatment of the subject see the following series of papers by Benjamin M. Selekman, shortly to be issued in book form by McGraw-Hill Co. under the title LABOR AND HUMAN RELATIONS: *When the Union Enters* (1945) 23 HARV. BUS. REV. 129; *Administering the Union Agreement* (1945) 23 *id.* 299; *Handling Shop Grievances* (1945) 23 *id.* 469; *Resistance to Shop Changes* (1945) 24 *id.* 119; *Wanted: Mature Managers* (1946) 24 *id.* 228; *Wanted: Mature Labor Leaders* (1946) 24 *id.* 405; *Conflict and Co-operation in Labor Relations* (1947) 25 *id.* 318.

ities on the job—everything affecting those relationships possesses its potential for intensifying or reducing the resistant behavior that comprises friction. There is no escape from the reality that labor relations encapsulate all the psycho-social influences shaping job behavior—influences ranging from the close concerns of family and kin, through the tense uncertainties of the actual shop community, to the diffuse encirclement of our whole changing society.

Thus it is that shop friction—natural, everyday, garden-variety phenomenon in work-behavior though it is—does not lend itself to facile, *ad hoc* administrative attention. Efforts to deal now with this resistance and now with that, now with one "agitator-type" and now with another "hard-boiled" supervisor, now with one union "autocrat" and now with another "troglodyte" in management, miss the fundamentals of the continuing problem. But if the approach through relationships discourages confidence in specific formulae or hortatory recriminations, it also indicates the focus of remedial action. Improvement in shop relations alone promises a diminution of shop friction.

That so many wide-reaching external forces find their reflex in shop behavior in no way counters the validity of this guide for action. For instance: a soundly-functioning economy within which employees obtain steadily increasing security, rising standards of living, and good job opportunities certainly constitutes a basic condition of stable labor relations. It is also certain that no individual manager, no local union administrator can *as an individual* and alone assure the establishment of these communal prerequisites of co-operativeness in the shop. None the less, if an administrator succeeds in building good relationships with the men he leads, his local shop community proves better able to withstand whatever stresses may bear upon it. This is true of any social institution, as the experience of families during the depression of the Thirties shows. When the ties between husband and wife, parents and children were strong and positive, the family unit they composed came safely through the economic stresses under which a weaker one broke.[4] In the same way a shop community in which management and men, union and company have established relationships of mutual trust and understanding will be less affected by adverse external influences than one in which fears, suspicions, and tensions run strong in the currents of daily dealings.

Granted this crucial significance of local shop relationships, the reciprocal also remains true: if sound relations are to be developed, objective conditions in the immediate work environment must meet the test of communal judgment. The sweat-shop, the speed-up, the sub-standard wage, hardly help create the kind of work environment in which the administrator may build positive shop relations. Fortunately American management shares widely with unions today a belief in high wages, rising living standards, good work conditions, etc. This communal code, so to speak, expressing the American economic faith, may put a floor under shop

[4] ROBERT COOLEY ANGELL, THE FAMILY ENCOUNTERS THE DEPRESSION (1936); RUTH S. CAVAN and K. H. RANCK, THE FAMILY AND THE DEPRESSION (1938).

frictions, just as public sanitation, the first essential of preventive medicine, puts a floor under personal illness. Measures for improving shop relations may then become instruments for reducing those frictions that remain to exacerbate dealings between management and men.

V

If this analysis is valid, and if friction and disputes, distinct phenomena though they are, represent also dynamically related types of behavior emerging out of the continuous flow of shop relationships, is not our first question this: Can the now familiar procedures developed for handling disputes be utilized for dealing also with the "precursor-behavior" comprising friction? These procedures—grievance adjustment, contract negotiation, contract administration, union-management cooperation in its evolving forms, and so on—are tools, of course, that have been developed as part of collective bargaining. But this origin in no way militates against their more comprehensive uses to industrial relations. For one thing, the unionized shop has now become by public policy the dominant pattern of relationships in the basic industries upon which the American economy hinges. The types of labor disputes arousing major public concern accordingly are those arising between employers and the unions speaking for their employees. By the same token the frictions that precede disputes attain particular significance as they are encountered in the current framework of collective dealings. For they guage the quality of underlying relationships in the grass-roots shop where those currents of human feeling and belief take their rise that either make collective bargaining work from day to day—as all concerned still hope it will work in the United States—or silt up the flow of daily dealings until production is obstructed by still another flood of damaging disputes.

Are the administrators in industry, then, obtaining from the procedures of collective bargaining the full measure of controls upon shop behavior potential in them—and if not, why not? Such questions have a familiar ring; the arena of collective bargaining resounds with them. But exhortation, condemnation, recrimination drown out any real probing in what is specifically asked: How can unions be forced to deliver observance of the contracts they sign? How can men be prevented from staging illegal walkouts instead of submitting their complaints to the contractual grievance procedures? How can negotiators, on both sides of the conference table, be compelled to bargain in good faith?

Attempts at answer take varying directions. For some only legal controls offer promise: penalties for infractions, curbs on abuses, restrictions on union activities. For others "better" leadership seems essential: union officers must become more responsible, less power-driven and competitive, more courageous in disciplining their union members; or management must really accept collective bargaining, restrain its "greed for profits," discharge its responsibility to the whole economy by "maintaining purchasing power." Still others see the answer in time, time for the swift

growth of union organization to settle down into stable, accustomed relationships.[5] But few have begun to inquire into collective bargaining too as a species of human behavior, with its characteristic procedures operating within the characteristic context of the shop community.

It is the simple thesis of this discussion that the behavioral approach is the only thoroughly realistic one, and the only one that promises maximum utilization of these collective procedures, whatever the frame of legislation within which they will operate. Just what, then, does this approach demand in daily practice?

Consider first the grievance procedures. That this adjustment machinery constitutes the heart of the joint agreement has become a truism. But typically consideration and disposition of the shop complaints submitted to it are held within such narrowly legalistic bounds that frictions inevitably have no chance for recognition, let alone attention. For the grievance procedures are operated as a form of sieve by which the "legitimate" shop complaints can be separated from the "invalid." Legitimacy is equated with the ability to prove the right to consideration by reference to a stated clause in the written agreement—an arguable charge of contract violation. Grievances establishing such title to joint consideration are deemed "admissible' for handling by the adjustment procedures.

Let it be granted at once that such preliminary sifting and testing must always constitute the first step in dealing with shop grievances. But what does one do with the "invalid" grievances, the complaints for which no title to consideration, or only a dubious one, can be established within the definitions of the contract? Under normal practice those complaints are either "dismissed" from any consideration at all, or after consideration are "denied." But do the dissatisfactions they symptomize necessarily disappear because they have been pronounced not susceptible of treatment by the legalistic remedy the aggrieved has demanded? The experienced administrator knows only too well the answer. Until the dissatisfactions have been traced to their source and effectively handled, the shop continues to face the frictions that either crystallize into repeated differences and disputes, or simmer as shop unrest, "illegal" walkouts, absenteeism, insubordination, slow-downs, and clique hostility. No complaint, in a word, as a symptom of human dissatisfaction rather than a claim for "legal" remedy, is ever really "dismissed."

Manifestly the joint grievance procedures will yield their fullest usefulness when they become not the sort of legal sieve they have too long been made—the instrument for separating "valid" from "invalid" dissatisfactions—but rather a means for determining discriminatingly how all dissatisfactions should be handled. Those that must be denied the right to *legal* remedy remain still matters of concern. The responsible official must seek to discover the sources other than the objective shop

[5] The invocation of time and patience as stabilizers in collective dealings possesses its measure of validity. For with time the new relationships become the accustomed ones; like any social community the unionized shop acquires its own rules and laws and customs and disciplines to which men conform because they have become established and habitual. But beyond these ameliorations of time, we still need to discover how the transition can be accelerated, and desired relations purposively constructed.

conditions originally protested from which these "invalid" dissatisfactions stem. In terms of these likely causes he applies such tools, other than legal adjudication, as may appear promising in their treatment.

It would be comfortably reassuring if, at this point, we could marshal a whole kit of such tools. Unfortunately, however, all such measures now available are yet tentative and experimental, simply because the social sciences from which they are derived are yet in their early stages of development. But they do exist, if only in a still formative stage of development. One of these is the interviewing or counseling orientation. The administrator—on the union or management side of the joint machinery—learns how to listen rather than argue with a complainant. As he listens, he tries to spot "human," that is, subjective or psycho-social, facts, as carefully as objective or legal ones. He does not tell the most irritating "griper" to "stop talking nonsense." Instead he watches him as any "repeater" should be watched, simply because repetitiveness in negative human behavior constitutes a symptom of something wrong somewhere. Nor does he "soft-soap" or appease the inflammatory militant. But he recognizes excess too as a symptom. The man who inflates complaints and enlarges upon his wrongs as he tells them may be obsessive, or politically ambitious, or a party-line manipulator. The militant, moreover, often becomes more than an individual problem because typically he seeks to make himself spokesman for a bench group, or a department. Individual and group relationship, pressures and conditions in the shop and outside, all mark the friction points at which the responsible official watches for symptoms indicating possible trouble ahead.

When a particular employee or supervisor seems such a "friction point," the administrator of the grievance machinery who has been instructed in listening carefully to men's complaints has also the advantage of continuing relationships with the disturbed and disturbing individual. In so far as the relationship is good and perceptive, he is likely to know something of the personality of each complainant, and even of possible stresses and troubles facing him outside the shop. His sympathetic listening may by itself afford relief to the aggrieved, if only through the process of helping him "get a load off his chest." The process, moreover, conduces toward good relationships, if only because bonds are strengthened by the conviction of "mattering" to one's fellows and superiors. And strong, positive shop relationships constitute a major instrument for reducing frictions and disputes.

From this point of view it is highly desirable that every shop and every union official have some training in counseling technique. A disturbed complainant may, however, need more assistance than the operating official can give or should give. Reliance should then be placed upon trained experts, either on the staff or in the community, to help such an individual discover the source of his dissatisfactions and thus gain insight into his true problems of adjustment.[6]

[6] See ROETHLISBERGER AND DICKSON, *op. cit. supra* n. 2, 189-376; CARL R. ROGERS, COUNSELING AND PSYCHOTHERAPY (1942); FRANZ ALEXANDER, THOMAS MORTON FRENCH et al., PSYCHOANALYTIC

Needless to say, the shop can never become a mental hygiene clinic; its daily work demands an exacting, disciplined and virile structure of job relationships. But even war experience indicated how relevant such counseling skills could be for satisfactory military performance; their varied peacetime applications have proved themselves in education, social work, and neighborhood centers. Should not these skills be thoroughly explored also in industry?

In much the same way, all cases submitted for "legal" remedy should be scrutinized for the information they can yield on bench associations in the plant: Is a complaint prosecuted by a group of employees; do such groups appear with marked frequency before the adjustment machinery; does a complainant function in his grievances as spokesmen for fellow employees, and so on? Once more such social data must be traced back to their sources. Recurrent complaints from a given department, for instance, may prove rooted in really objective difficulties—an inequitable rate schedule, or a bad flow of materials, or the impact of disturbing plant changes, or some other such cause. Or they may reflect the sheer militancy of a clique or faction, led by an employee avid for leadership; or disturbed relationships with foremen, or something else again of this sort. Awareness of such groups then can implement the effort to promote co-operation.

For although the grievance machinery thus uncovers negative feelings and resistant responses, the very process of dealing with them should clear the way for eventual co-operation. The actual evocation of positive sentiments, however, transcends the adjustment procedures; its instruments are found in contract negotiation, in production planning, in general shop administration. Yet as the focus of concern thus passes from handling complaints and dissatisfactions communicated through the adjustment machinery to the promotion of co-operation, there should be no sharp separation of functions. In terms of underlying relationships all such processes are vitally interrelated parts of an organic and dynamic whole.

Too often, however, effort concentrates on setting rigid boundary lines between these processes. Within the system of law and order established by the joint agreement, of course, such divisions have their recognized uses: certainly distinctions must be drawn between the application of existing law and the making of new law. But in their social and psychologic content the revisions of terms negotiated across the bargaining table time and again reflect unsettled grievances carried forward from the expiring agreement; they also furnish opportunities for the participation and consultation that carries back collaborative sentiments to joint dealings. Just

THERAPY (1946); BURLEIGH B. GARDNER, HUMAN RELATIONS IN INDUSTRY (1945) 168-255; ANNETTE GARRETT, INTERVIEWING—ITS PRINCIPLES AND METHODS (1943); PERSONNEL COUNSELING—KEY TO GREATER PRODUCTION, U. S. War Dept., Civilian Personnel Pamphlet No. 1 (1943); PROCEEDINGS OF THE NATIONAL CONFERENCE OF SOCIAL WORK (1943) 216-236. A sample of periodical literature might include: Burling, *Mental Hygiene in Business and Industry*, MENTAL HYGIENE, April, 1941, 177-187; Menninger, *Psychiatry and the War*, ATL. MONTHLY, Nov., 1945, 107-114; Gage, *A Foundation for Industrial Counseling*, THE FAMILY JOURNAL OF SOCIAL CASE WORK, July, 1942, 176-182; and Gage, *Bringing Case Work to a Labor Union*, *id.* May, 1945, 106-111.

so the administration of contract provisions should involve more than the correction of infractions.

Every practical administrator familiar with the negotiatory process can cite evidence demonstrating its continuities with concrete experiences behind the men at the bargaining table. Close scrutiny of the dissatisfactions brought to light by the grievance procedures, accordingly, should serve as excellent preparation for meeting demands likely to be raised during the next negotiations. The completion of the new agreement, in turn, should represent a positive experience for all who must now live under it. For negotiation constitutes a major channel of communication between employer and employees, a channel through which they discuss matters of prime concern in their continuing relations. Yet the actual negotiators often talk more to the press than to their own people. They then discover that an agreement handed to men "on a silver platter," or formulated *for* them by "top" officials, carries little effect beyond the sense of victory or defeat—again a conflict emotion. Only participation in formulating and determining the issues thus brought into the open carries back into daily shop dealings the sense of direct responsibility for making the settlement work. The special meetings at which some companies (though too few) seek the judgment of their supervisors before negotiations upon the probable issues of the conference room, and after the agreement has been drawn discuss application of its terms, are vehicles of such communication and participation. Some unions too—though again too few—convene membership meetings to receive reports upon the progress of negotiations, as well as to ratify the final terms. Joint commemoration of the new shop "constitution," when its completion is jointly commemorated at all, is even more widely limited to the top negotiators. But always, and inevitably, the disregard of negotiation as a positive social experience, the concentration upon it as a legalistic tug of conflicting interests, forfeits an opportunity for both reducing frictions and evoking the co-operative sentiments.

In much the same way, daily administration of the terms of agreement should become more than fair maintenance of a status quo. The negative sentiments evoked by infractions can and should be resolved, of course, by adjudication. But at each of the foci of relationships important enough to receive joint contractual safeguards, the parties should ponder also means for evoking the positive sentiments that engender co-operation—the vivid sense of joint interest, the participation and consultation that build conviction of "mattering" on the job to the whole shop community.

Consider, for instance, the most emotion-loaded issue of contract negotiation: union membership as a condition of employment. Admittedly it is impregnated by the clashing values of the parties; it is also an instrument of the conflict over power and organizational security. Naturally, therefore, it gives rise to the sharpest-edged kind of frictions and disputes. But strategic problems of human relations remain for the parties to an agreement beyond any "settlement" on this issue they may write into its terms. Does the union which has been granted any variant of

"union security" make union membership a positive experience for the workers? Or does the company make their association in the shop community a true job fellowship? The "join-up-or-else" approach creates little more warmth for union affiliation than does the perfunctory assignment to a work place for the job. Union officials worried over "nickel-in-the-slot" members who want always to know "what they are getting for their dues" need to ponder ways for making the act of affiliating something more than compulsory initiation for a fee; just as the employer, embittered by the lack of loyalty his employees manifest, needs to probe the sources of that sentiment in modern industry.

The creation of positive relationships, in a word, requires systematic planning. Such systematic planning in the human affairs of the shop should continue from the time of hiring, through placement, training, acquaintance with the whole process of which any specific job is part, to every aspect of the production program. Few managements today have to be persuaded that the economic and technical aspects of production programs demand careful organization and planning; they have yet to realize, however, that the human impact of the measures they contemplate can stymie results or advance them. Careful provision must be made against the suspicions, fears, and resentments they may evoke; careful watch must be kept for sources of mutuality and co-operativeness. The men who do the work must constitute as integral a part of the planned production program as the materials on which, the machines with which, and the market conditions within which they labor.

Thus the administrator who must introduce any change into his shop—be it new equipment, or new methods, or a shift in product, or a new supervisory force—must prepare for the jolts that may be transmitted throughout the established structure of relationships. The sense of threat, the alerted, wary suspicions may be counteracted by thoroughgoing preliminary explanation and consultation—with union officials, with bench representatives; while either the union or a management spokesman, or both, discuss every aspect of the projected program with the men involved.

Beyond such general preparation, management should avoid the "friction-points" marked by prior shop experience. A worker who tends to be grievance-prone, or rigidly "set in his ways," is not, for instance, chosen as major testing ground for an innovation—the pilot employee, so to speak. For in the general atmosphere of wary watching, such a man easily galvanizes the suspicions that become resistance to the change; a hostile bench group may readily form under his leadership. To deflect such group hostilities is more difficult than to prevent them.

The next, and even more important effort, however, the transformation of such cliques into co-operative work teams, the constructive utilization, that is, of the impulses binding men at work together into bench associations, presents probably the most difficult problem of modern labor relations. What is required, above all, are supervisors and stewards who evoke positive sentiments and shop loyalties from the men they lead. For only to the degree that foremen on the one side and stewards

on the other are truly leaders of men will bench groups and shop teams tend to coalesce around constructive goals. The spontaneous associative impulses of the men at work will not then mobilize behind resistance to production policies; while the steward will find it easier to identify union policy with joint interests. It is sometimes amazing to the impartial observer to note the truly explosive appointments a management makes, only to register surprise or outrage later at subsequent eruptions. An employee of German extraction, for instance, was made foreman of a department dominated by Italian employees. Granted that national extraction must not count in promoting men, the new foreman nevertheless had made no secret of his general disdain for the men whom he supervised. His daughter was married—unhappily—to an Italian; he derided the fighting qualities of the Italian arm of the Axis; he described himself as "the only white man" in his shop. He did not last long as foreman; yet before he was demoted the sparks that flew between him and his men demonstrated the inevitability of dangerous friction in such relationships. In another plant, a white worker was promoted to foremanship in a department where the majority were Negroes. He had been articulate in expressing racial prejudice. The frictions that followed his promotion reverberated throughout the plant, and culminated finally in physical assault upon this foreman himself.

All such considerations simply reflect the kind of purposive attention the structure of relationships must receive if frictions are to be minimized and co-operation enchanced. It is impossible to exhaust the varying combinations of detail in which the general problems present themselves within each specific shop context. But as long as the administrator remains aware of the complex motivations behind the job behavior of his employees, as long as he sees them not as discrete numbers on a payroll, but as the associative, socially interacting human beings they are, he will learn what to avoid and what to neutralize, what to stimulate and what to promote. Just as he detours the negative "friction-points" in shop planning, he provides positive channels of *activity* in which interest in the job attains expression that manifestly "matters" in the whole production program: he invites participation in planning and improving the job; he promotes understanding of the process into which that job must fit, and familiarity with the final product as a result of co-operative labor. He makes the achievements of the shop community something to be shared by all, perhaps even through appropriate ceremonials. Tentative beginnings in this direction were made during the war through E-awards, visits by war heroes, and communal ship launchings. What symbols may prove appropriate to peacetime production remains to be explored. But the problem has yet to receive even adequate recognition.

Such symbols of work achievement, needless to say, do not replace the tangible rewards of the pay envelope; they supplement and coexist with them. Indeed, pecuniary rewards themselves constitute a major symbol of achievement in our society, so interlaced with, so integral to, the social organization of American pro-

duction that the impact of the pay envelope can never be minimized. But here once more we confront the thesis with which we began. Simply because friction and co-operation both are functions of shop relations, the one of their negative, the other of their positive components, everything that affects those underlying relationships bears its impress on daily job behavior. The pay-envelope exercises certainly potent effects upon the shop community, as does the manner of introducing changes, the exercise of authority and the imposition of discipline, the attitude toward the individual employee and the work group, the maintenance of job interest and work satisfaction, and so on. Even the home community within which a shop is located transmits its influences to job behavior. Snarled transportation facilities, bad housing, racial antagonisms manifestly are reflected in the relationships of men who are fellow-citizens as well as fellow-employees. That is why joint efforts toward making the hometown a better place in which to live also promote mutuality in the shop. The growing participation of management, unions, and employees, for instance, in community funds and social planning has its reflex in teamwork on the job. Men who work together in civic concerns cannot help but co-operate better in the shop.

VI

Clearly, then, every industrial administrator, whether on management's side or the side of the union, must watch for and utilize every opportunity to cement and improve relationships. The approach of the union official in this mutual responsibility, however, naturally differs from that of the company executive. For although both share the joint stake in efficient production and human satisfaction, the manager functions from day to day pre-eminently as an administrator; he does a good job when he combines most effectively the men, materials, and machines by which he turns out goods or services. In contrast, the union official is a political representative of men associated in a protest organization. He is constantly under pressure to increase material gains for his men. To maintain the solidarity of his ranks he is tempted to rely upon appeals to the hostile impulses that create frictional resistances and disputes. They are more easily evoked than the positive responses of teamwork; union men, like so many others, are more accessible to appeals "against" than to appeals "for."

We are not without signs, however, in spite of the tensions of the postwar transition, that union leaders are increasingly recognizing their stake in co-operation. The strikes in 1946 in the basic, mass-production industries obscured the fact that in thousands of shops union and management negotiated contracts without fanfare and without stoppages. The negotiations of 1947 even in heavy industry promise to unfold in a much less war-like atmosphere. Some labor leaders, moreover—as in textiles and in the needle trades—have never receded from their conviction that only by co-operation with management can the high standard of living potential in the American economy be realized.

As collective bargaining matures and stabilizes in the United States, it is to be hoped that ever-growing attention will be devoted to the construction of positive relationships in the grass-roots shop. For only through such relationships may frictions be held to a minimum and teamwork promoted. Some frictions will always remain. For relations between management and men contain not only legitimate economic differences, but also the tensions generated in all human relations. We may as well accept frictions as a fact of industrial life that cannot be completely eliminated from the shop, but can only be handled—or mishandled. If, and as, we learn to handle them with skill and understanding, we shall discover that co-operation too is a fact of industrial life.

MINIMIZING DISPUTES THROUGH THE ADJUSTMENT OF GRIEVANCES

ISADORE KATZ*

Labor disputes derive their form and dynamic impetus from the manifold grievances which cause them; any fruitful effort to minimize industrial conflict must be grounded on an understanding of the basic psychological character of grievances. Labor disputes are not comprehensible if judged by standards or norms of behavior usually applied to conflicts between groups contending only for monetary stakes. Efforts to convince workers that a contemplated strike for a wage increase, though it may be ultimately successful in terms of more cents per hour, should not be called because it will take months to make up the lost earnings, have no effect upon them. This is so because the real sources of the propulsive forces of the conflict are not disclosed by such an analysis. Men will undergo great privations and financial loss to overcome oppression. The goals in such a conflict frequently transcend material considerations. In modern industrial disputes much more is at issue than a wage increase even when a wage increase is the declared issue. The grievances which stir workers to take dramatic action are manifestations of profound resentment against a system of industrial organization which not only fails to yield economic security but, more importantly, denies the primacy of the individual in favor of that of the machine, negates his worth, diminishes his self-esteem and corrodes his personality.

Modern industry, preoccupied with mass production techniques, has concentrated upon creating abundance at lower unit costs. In its single-minded devotion to this objective it has excluded the workers from its field of vision except in so far as they service the tools of production. Eager to use machines in place of men, management has displayed callous indifference to the impacts of technological advances upon the men and their families. In pursuit of improved methods, skills have been scientifically analyzed and broken down to their simplest elements. The skilled mechanic has been disjointed, as it were, and each element of the job assigned as a single task to different workers, each of whom is required to conform to the monotonous rhythm of the machine. This steady erosion of skill has reduced the worker to progressively less important roles in the productive process, making him more easily replaceable until a new piece of equipment may dispense with him entirely.

Management has exhibited little evidence of concern that this process of splitting

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skills is frustrating the "instinct of workmanship." The drive for efficiency and the continuous search for the dependable and unvarying performance of the machine has induced an attitude in management which has denied the importance and dignity of the human being. One who is intent upon eliminating men at the machines or who seeks to reduce their contribution to the creative process to an irreducible minimum cannot be expected to be concerned about the welfare of the workers. Their fears and resentments and repressions are not within the orbit of "scientific" industrial engineering. The managerial mind which emerges in men engaged in directing modern production is characterized by imperiousness, sternly ordering the daily lives of the workers with little concern for their sensibilities and goals. This type of mind is marked by bland indifference and self-assertion. The purchaser of a "hand" to doff the machine or of an "eye" to spot a defect concentrates upon extracting as much of this single activity from the hand or eye as is possible, and to this end time and motion studies are keenly directed. To induce greater effort along narrowly confined channels of work, incentive systems are devised. The systems are coldly calculated in terms of units of energy; upon them complicated wage systems are erected. The ledger sheet of industrial management has no column in which entries can be made of the human cost of this process in terms of suppressed personality, economic insecurity and servility. Nor are provisions made for the active participation by the workers either in the wholeness of the production process or in the planning which so vitally affects them psychologically, socially, and economically.

To the worker this exclusion from the decisional area is an intolerable condition of servility; the erosion of his skill is an inhuman suppression of his urge to create, reducing him in status to a mere adjunct to the machine; the insecurity of his job is a source of continuous uneasiness; the systematic indifference of management to his aspirations, a maddening irritant. The indifference of the manager to his human machines derives from no inherent malice, but solely from the fact that the steady advance of industrial efficiency requires as many replaceable parts in the engine as possible. That the part may be human rather than mechanical has little apparent relevance to the demands of efficient operations.

Life in the plant contradicts all precepts underlying democratic processes in political life. In the shop the worker's worthlessness is impressed upon him at every turn. No use is made of his whole being. No demand is made on his capabilities beyond a few rudimentary motions. His intelligence is rarely challenged. No one calls upon him to participate in the formulation of governing decisions or policies, though he must execute them. This contradiction between the ideals of democracy and reality in industry is overpowering. This tyranny of industrial organization induces frustration, fear, anger and hostility. It is naked power not based on assent, endured because of economic insecurity—but endured only until such time as it can be overcome by the accumulation of countervailing power.

The aggressive worker singly challenging such a way of industrial life would be quickly discharged; but workers learned early that their individual impotence could be transmuted into power by combination. The emergence of the labor union was a social reflex in response to an inhuman institution. It made its appearance because of the natural coherence of persons similarly situated, who have shared the same experiences. Its members gain sympathetic understanding and warmth from each other. They share jointly the sentiment of animosity toward the managerial autocracy which acts on the ethic that it is more important to produce than to advance the well-being of the workers. All are frustrated in their search for economic security and status. All have the same yearning for liberation and are joined in a common endeavor to achieve freedom.

The worker's sense of grievance is deep-seated in his scarred ego—scarred directly, or through precept, by swift decree condemning the rebel to the hunger, misery and other ravishments of joblessness. So the union is formed to compel management to share governing power with the workers. Each worker seeks to participate in the planning of his own life or in the decisions which affect him, and the labor union is the institution which enables him to do so. It is his creation, moulded and directed by him, or at least energized by his desires. In it he finds sympathy and self-expression. In it he plans action to restore himself and his fellows to respectable status. In its councils he participates in plans devoted to his well-being. Through it he envisions the taming of managerial tyranny, the rebuilding of his self-confidence, and the fulfillment of his demands for respect. He looks to it alone for relief from economic insecurity, for no other social or economic organization within the industrial society concerns itself with his deep-felt wants. As the group achieves power, he shares in its success. The labor union engages his deepest loyalties, for it marks out a path along which he can walk with his fellows with head high, content that he counts, that his voice is heeded, and that his interests are preserved and protected.

It is natural that any assault upon this organization should be viewed by the worker as a direct attack upon each member's personality, not alone as an attack on his economic bargaining position. The discriminatory discharge, the blacklist, the yellow-dog contract, and the company-dominated union were all recognized by workers as undisguised means ruthlessly applied by management to perpetuate their state of individual helplessness. Almost fanatical intensity marks the struggle to resist managerial efforts to bring about the disintegration of the group.

This brief analysis will suffice to show the powerful psychological forces which charge the groups engaged in industrial conflict. The grievances which give peculiar virulence to industrial disputes are those that are pervaded by a sense of individual oppression or which grow out of fear of the destruction of the organism devoted to the worker's interests. The answer to labor disputes will continue to elude us unless in the search for it these fundamental truths are kept dominant. To mini-

mize labor disputes we must unequivocally reconstruct the form of industrial organizations so as to preserve the integrity of the individual and to provide a special bilateral form of industrial government.

To accomplish this there must be: (1) full and complete acceptance of the labor union as the instrument of a participation in industry by the workers which will not only be tolerated but will be welcomed by management; and (2) a system of *daily* industrial government in which each worker will be accorded those civil rights in his place of work that will assure not only the right to petition for redress but also the adjustment of his grievances. These two conditions are basic to industrial peace and the process called collective bargaining. The provisions governing grievance procedures in collective bargaining agreements are vital governmental processes which fulfill both conditions. Since the meaning and operation of the second condition only are within the scope of this paper, it alone will be discussed, with the understanding that the first is a prerequisite.

Because of its importance, the procedure for adjusting grievances must be wisely constructed and its basic integrity preserved in operation. It must conform to the basic nature of the union and the psychological needs of the workers. Care must be taken that it does not serve, as so many grievance procedures have served, as a new means for attacks upon the union nor as an excuse for excluding, by means of statues of limitations, the very grievances it was intended to air. "A proper handling of such questions is a major part of the industrial relations problem of making collective bargaining work. Collective bargaining is not confined to the making of an agreement once a year. It is also a day-to-day process and, on this score, the grievance procedure plays a highly important role."[1] The process of adjusting grievances is daily confirmation of the right of the workers to participate in directing the course of their lives. It is thus the core of industrial democracy, having been created by the legislative process engaged in by representatives of both parties to the collective-bargaining relationship. The mere establishment of the grievance procedure is concrete and tangible evidence to the worker that management is sharing power and control with him through the union. It is one token of his liberation. Too little recognition has been given by management to this symbolic nature of the grievance process.

The reluctance of management to appreciate the implications of the process of adjusting grievances is often revealed at the very inception of collective bargaining, during the debates over the scope and form of the grievance machinery. This reluctance is disclosed by management's direct or subtle efforts to post the agreement with "no trespass" signs to protect previous title to the domain it calls "management prerogatives." The meaning of such bargaining is not lost on the union and the workers; it gives rise to the tension that always appears when status, already inferior, is in jeopardy. The difficulty is that management fears the end of its exclusive

[1] Chrysler Corp., 10 WAR LAB. REP. 551, 554 (1943).

reign and the beginning of a relationship which marks the passing of individual bargaining in the plant. It fears that the individual has now become an integral part of a group and, as in all forms of government, the will of the group, not that of each individual, must prevail. It fears, in short, the transmutation of an item in its cost account into a problem of human relations.

The rules and regulations evolved by collective bargaining represent the current common judgment of the union and management on matters which experience has shown to affect all of the workers. This new form of authority, expressed in the terms of the collective agreement, commands respect and must receive it precisely because it is a product of the democratic process. Neither management, nor the union, nor any individual may violate its formal declarations. The difficulties are enchanced by management's fears that the union and its members are covertly seeking to intrude themselves into all segments of its affairs. It views the grievance procedure as a mere device with which the union will seek to obstruct the efficient operation of the plant. These fears are completely unjustified when viewed in the light of the development of collective bargaining in any industry. They are contradicted in every industry where the collective relation has matured.

Experience has demonstrated over and over again that the emotional intensity of labor disputes is measurably reduced by the institution of a grievance procedure. The urgency of installation of machinery for the adjustment of grievances was clearly seen during the course of World War II by the National War Labor Board, which unanimously adopted the following statement by Chairman William H. Davis on July 1, 1943:[2] "The experience of the National War Labor Board in the administration of the no-strike, no-lockout agreement has shown conclusively that proper grievance procedures under collective bargaining agreements have: (1) Prevented abuse of the no-strike, no-lockout agreement. (2) Removed obstacles to high morale and maximum production. (3) Preserved collective bargaining as a basic democratic institution in the total war effort." It is evident that the therapeutic value of the grievance procedure is so great that even during the greatest war in history, when workers were imbued with exalting loyalities, its absence was an obstacle to high morale and maximum production.

We may turn now to a consideration of those structural elements of the grievance procedure which will provide the machinery for the attainment of its objectives.

1. *The grievance procedure must be consistent with the system of collective-bargaining relations.*

There cannot be individual bargaining concurrently with collective bargaining on any matter which concerns the relations between management and employees. If management demands that the individual worker shall have the right to present his grievances for adjustment independently of the union, it thereby reveals that it has not fully accepted the collective-bargaining relationship. To the union this

[2] N. Y. Times, July 1, 1943, p. 11, col. 1.

is a patent indication that management seeks a return to individual relations and that the struggle for recognition is not over. At once the atmosphere becomes charged with the tensions of an organism on guard. Instead of enjoying the relaxation of the secure, the members of the group are wary of every proposed adjustment, scrutinizing it with meticulous care to determine whether it is an effort to lure the individual by favoritism and to dissolve his loyalty to the group by discriminatory settlement. If an individual can secure a speedy and favorable settlement without recourse to the union, or if new difficulties arise when the union intervenes, the lesson is clear. So long as this contest over the loyalty of the individual exists, the field is tense with an uneasiness never conducive to calm deliberations. Insistence by management upon protecting the right of individuals to present grievances is viewed as a belated concern for the personality of the worker and as hostile to the group existence.

In argument over this point management seeks support in the proviso to section 9(a) of the National Labor Relations Act,[3] which declares that the requirement that the employer bargain collectively with the duly designated agency shall not prevent an employee, or a group of employees, from presenting grievances to the employer. During the early years of that Act, the apparent contradiction between effective collective bargaining and this proviso was seized upon by charlatan industrial relations advisers who peddled their services to industry with the promise that under legal cover of this clause they would break the union without exposing the employer to the penalties of the law. Employers who utilized such services were seeking another field on which to fight the battle which the National Labor Relations Act had declared should not be fought again. Collective bargaining in such plants remained in a state of arrested development marked by reciprocal belligerence. Manifestly, in such an atmosphere grievances are grossly distorted and the adjustment process is directed, not at treating the source of the complaint nor at reaching a tolerable accommodation, but at the collateral issue of union security. Thus, instead of minimizing disputes, this parallelism, by irritating the deeper layers of personal insecurity which led to the formation of the group, infused each grievance with the virus of hostility and altered its character.

The National War Labor Board was fully aware of the dangers inherent in such hybrid systems, but because of the exigencies of the war it compromised the issue and evolved a procedure whereby the aggrieved individual could make the choice himself at the first step whether to present his own grievance, either alone or accompanied by the union steward.[4] Obviously this device does not dissolve the tensions which arise each time an individual chooses to proceed on his own and secure an adjustment which, though satisfactory to him, may constitute a variation of the agreement or run counter to the group interests. Even the supervisor may be unaware of all the implications of an individual adjustment.

[3] 49 STAT. 453 (1935), 29 U. S. C. §159(a) (1940).
[4] Aluminum Co. of America, 12 WAR LAB. REP. 446, 454 (1943).

The National Labor Relations Board, on the other hand, was compelled by an adverse decision[5] to come to grips with this problem. Its conclusions are set forth fully in the *Hughes Tool Company* case,[6] in which it held that the company had been guilty of a violation of section 8(5) of the Act "by adjusting grievances of individual employees without affording the union as exclusive bargaining representative the opportunity to negotiate respecting their disposition." The board held that section 9(a) of the Act means that individuals and groups are permitted "to present grievances to their employer" by appearing at every stage of the grievance procedure but that the exclusive representative

> . . . is entitled to be present and negotiate at every stage concerning the disposition to be made of the grievance. If, at any level of the established grievance procedure, there is an agreement between the employer, the exclusive representative, and the individual or group, disposition of the grievance is thereby achieved. Failing agreement of all three parties, any dissatisfied party may carry the grievance through subsequent machinery until the established procedure is exhausted.

This reconciliation of the right of the individual with the paramount right of the bargaining agency has the virtue of preserving the industrial governmental power as well as the opportunity for individual self-expression. It thus accords with the two prerequisites for minimizing labor disputes.

2. *The grievance procedure, being governmental in nature, must possess stability and permanence.*

The essential qualities of stability and permanence are imparted to the grievance procedure by establishing a clearly defined channel through which grievances may be processed. The channel leads from the worker or the aggrieved group through several steps, each superior to the preceding one by a significant increment of adjusting power, to the final authority. At each stage in the procedure the grievance is jointly examined and appraised by representatives of the union and representatives of management. The representatives of the union are elected by the workers or are appointed to positions at the higher levels by their duly elected officers. Those employees who are elected to act at the initial stage are usually called stewards. At the second stage the representative may be a group, representing a larger operating division, composed of several stewards or a special shop committee. The union usually establishes levels in its own organization as counterparts to the levels of supervision.

In erecting this structure it is important that not too many stages be created, for this militates against prompt disposition of the grievances. Few agreements permit more than five levels; but the number of steps will vary, depending upon the internal organization of both the employer and the union. No fixed pattern

[5] N. L. R. B. v. North American Aviation, Inc., 136 FED. (2d) 898 (C. C. A. 9th, 1943).

[6] 56 N. L. R. B. 981 (1944), *aff'd.* on this point in Hughes Tool Co. v. N. L. R. B., 147 FED. (2d) 69 (C.C.A. 5th 1945), indirectly approved by the Supreme Court in Elgin, J. & E. Ry. v. Burley, 325 U. S. 711 (1945).

will serve all conditions. Obviously one form will be assumed where a single small employer is involved and a more complex form where an association of employers is in the collective relationship. Also the form will differ to the extent that the union employs business representatives or other paid agents, and at the step at which they participate. Similarly, the existence of an industrial relations division in management will affect the structure. In short, the structure must be designed to meet the special circumstances of the parties to the agreement.

The significant point, however, is that by the very act of marking out the course of a grievance and designating and electing personnel to administer it, the procedure is presented to the workers as a construct of permanence and stability, and thus induces confidence in its efficacy. To achieve further assurance of continuity, the employees who are stewards or committeemen participating in the process are placed at the top of the seniority list.

3. *The procedure must be swift as well as sure.*

Having planned the grievance procedure on an ascending scale in space, as it were, it is imperative that the parties make it certain in time as well. The workers must be assured that their grievances will move along. Delays in consideration or decision can drain the process of all confidence. Such delays, unwarranted by the complexity of the problem or unsatisfactorily explained, stir the inner anxieties of the worker that the management still does not take him seriously. Delays may then transmute a simple grievance into a serious threat to the relation by calling up the ever-present fear of being relegated to the status of an inferior whose complaints are not worthy of attention:

> One of the chief causes of labor unrest in many industries is the failure of the representatives of the company and of the union to settle grievances with dispatch. Although a particular grievance may appear to be a minor and insignificant matter when viewed from the standpoint of the totality of plant-operation problems, nevertheless to the individual employees involved in the grievance it is a matter of major concern. If a few employees develop a feeling that a consideration of their grievance is being stalled with resulting injustice to them, their fellow employees naturally become fearful that they may receive the same treatment, with the result that very soon a wave of distrust and dissatisfaction in regard to the handling of grievances sweeps the plant. This negative attitude toward grievances spreads to other relationships between the company and its employees, with the consequence that labor morale is injured and maximum production affected detrimentally.[7]

A properly designed grievance procedure avoids such consequences by fixing the time limit for consideration by management at each stage. Such time limits may be extended by mutual assent. It then becomes a matter of right for the union to move on to the next step if a satisfactory adjustment is not reached. Some agreements do not fix the time limits between steps but declare an over-all time limit from the inception of the grievance to the submission to arbitration, within which

[7] General Chemical Co., 3 WAR LAB. REP. 387, 392 (1942).

all the steps must be traversed. Some agreements fix certain days when grievances which have not been adjusted at the lower levels will be taken up by officials with greater authority. No formula can be induced from the practices established by the innumerable agreements in effect. Each collective relation must establish the time limits for managerial consideration which best suit its special circumstances. The vital point is that there must be an assurance of flow of the grievance, with the unchallenged right in the union to carry the grievance forward.

Care must be taken that these time intervals are not converted into dams in the channel, analagous to statutes of limitations in the law. Thus many employers seek to provide that unless the grievance is presented or appealed within the specified time limits, the right to further consideration is foreclosed. A grievance procedure so perverted is obviously designed to keep the management free from stale claims and to penalize the tardy. Whatever may be said in favor of such a penalty system, its vice is that it leaves the grievance unsettled whereas the purpose of the procedure is to adjust, not exclude, grievances.

4. *The grievance channel must be deeply dug to receive all complaints.*

Grievances are complex reactions by workers to the interplay of psychological, social, and economic forces. A proper grievance procedure will be so designed that it will carry all grievances. Yet, in the early stages of the collective relation, management's bargainers tend to be concerned with preventing the adjustment of all but a restricted class of grievances. The grievances they would consider are only those which involve the interpretation and application of the terms of the agreement. This limitation misses the entire point of the grievance procedure and its office in the collective relation. The error derives from failure to appreciate the multi-faceted nature of the collectively bargained agreement.

The collective bargaining agreement is at once a business compact, a code of relations and a treaty of peace.[8] As an economic accord it sets forth the terms which will govern hiring, work and pay. Normally it is not a contract of employment. As a peace pact it assures against strikes and lockouts. As a code of relations it seeks to create a *system of government* through the processes of which grievances are resolved, understanding achieved, a line of communication opened between management and employees, and a self-disciplining labor force secured.

The collective agreement is thus a different kind of document from the commercial agreement. The ordinary contract does not partake of the nature of governmental systems; the adjustment clause sometimes incorporated in it serves merely to provide a substitute for a court to resolve disputes over interpretations of the other contract terms which define with care the boundaries of a limited relation between the parties. Thus it is merely ancillary to the other terms of the contract.

[8] *Cf.* J. I. Case Co. v. N. L. R. B., 321 U. S. 332, 334-339 (1943); Gregory, *The Enforcement of Collective Labor Agreements by Arbitration*, 13 U. OF CHI. L. REV. 445, 446-450 (1946).

In the collective agreement, on the other hand, the grievance procedure is a "system of government" which exists independently of the other clauses of the agreement.

The narrow view that a complaint need not be considered unless it involves the interpretation or application of the provisions of the agreement is the least desirable approach to the objective of adjusting grievances. It is not only at odds with the ultimate goal of developing a harmonious and amicable relation in which each worker feels that he is a vital and worthy part, but it proceeds on the erroneous assumption that the relation is capable of precise definition in the contract. It predicates a static relationship in which every point of contact between the contracting parties can be fully reflected in words. Though this may be true of commercial relationships in which the only interest one party has in the other is the article bought or sold, the premises leased or sold, or the money earned or lent, it is not true of the dynamic relation between management and labor. Here the relationship is a multifarious web made up of economic, social and psychological strands inextricably interwoven yet continuously changing in pattern. This community is affected by changes in population, outside competitive forces, outside community activities, changes in production techniques, scientific discoveries, market conditions, internal group relations, and a host of other unpredictable events necessitating quick accommodations—in short, it is a dynamic field of adversary and co-operative group relations. The contingencies in such a relationship can no more be set forth in a contract than can the contingencies of the marital relation. Both defy definition.

Any effort thus to limit the scope of the grievance procedure to the interpretation and application of the provisions of the agreement presupposes that the agreement's provisions can be made so clear and precise as to rule future developments not contemplated by the parties. Such a collective agreement has never been drawn. If it were drawn it would be a particularized code of such length as to destroy its utility. The drafting of it would keep the parties at the bargaining table engaged in interminable exercises in semantics. Such an agreement, if it were ever completed, would serve merely as a vehicle for endless disputes over the meanings to be attached to each phrase. Instead of settling grievances by ameliorating the conditions which nourish them, the parties would be engaged in conflicts over words. The dynamics of the relation preclude such an agreement. Even legislative bodies of political government, when confronted with the necessities of enacting law to govern a kinetic field of action, turn to the administrative process to deal with unanticipated developments.

That collective bargaining agreements cannot and do not cover every event was recognized by the National Labor Relations Board when it pointed out that "any adjustment of a grievance constitutes, if the subject matter is dealt with in the agreement, an interpretation and application of the contract, or, if the subject matter is not dealt with in the contract, bargaining respecting a condition of employment."[9]

[9] Hughes Tool Co., 56 N. L. R. B. 981, 982 (1944).

The Railway Labor Act draws a significant distinction between grievances and disputes growing out of the interpretation or application of the agreement. It declares that the purpose of the Act is "to provide for prompt and orderly settlement of all disputes growing out of grievances *or* out of the interpretation or application of agreements covering rates of pay, rules or working conditions."[10]

The unwise demand that the complaints of the workers must come within particular categories described in the various contract headings recalls the procedural intricacies of the early common law, when a cause of action had to fit the rigid requirements of the available writs. If the cause of action could not be made to meet the technical requirements of the writ, the doors to the courts of justice were not opened. How this denial of process affected social and economic relations in those days is not fully recorded, but we do know that even the common law had to be augmented by equity jurisprudence because of the need to afford means for the adjustment of disputes. In the industrial community we know at the very outset of bargaining that grievances will arise because of occurrences not envisaged by the negotiators and that they cannot be exorcised by pronouncing them out of contract bounds. All grievances, whether real or fancied, reflect discontent and affect production and should be settled. Grievances which are banned find expression in reduced morale, or have the curious trait of assuming the guise of admissible grievances. This is well known to all production men. The excluded and therefore unsettled grievance has the annoying characteristic of making itself known through a drop in efficiency, absenteeism, slowdown, controlled production, quit or turnover. These have always been symptoms of protest. Obviously, the grievance procedure is installed in a plant not to seal up avenues of expression and protest but to open up paths to adjustment.

The sense of injustice of aggrieved workers runs deeply to the very center of their being, and unless allayed quickly will be converted into hate and hostility leading directly to the flaming labor dispute—a result the grievance procedure is designed to avoid.

The grievance procedure furnishes a means of orderly life in the mill. Thus the grievance procedure is not merely the core of the agreement, it is the mechanism whereby industry accommodates itself to the inner drives of working beings. This goes far beyond the confines of the contract clauses and takes account of the whole gamut of human aspirations and fears. It serves as an outlet for the aggrieved worker and at the same time keeps management in close touch with the tone and temper of the relationships in the plant. It reveals to management the reactions of the individuals and the code of behavior of the group of which they are a part. The knowledge thus gained is of utmost importance to the policy makers on both sides. To block up this index of plant morale is not the way to minimize labor disputes but rather the way to remain ignorant of their physiology.

[10] 48 STAT. 1186 (1934), 45 U. S. C. §151a(5) (1940).

5. *Grievances should be presented in writing at some stage beyond the initial step.*

Unions as well as management usually agree that a grievance should be presented in writing, but not at the first step, where informality should prevail. If, however, it must be carried further, good administration requires that the grievance be set forth in written form. This is desirable for several cogent reasons, the most important of which is that after the initial discussion the real basis for the grievance may have been disclosed. The written complaint establishes a record of the grievance, its nature, the date of its disposition, and the manner of adjustment. Such records can be of inestimable value both to the union and the management in furnishing data from which general conclusions can be drawn and broad measures taken to treat conditions which have been chronic breeders of discontent. They furnish as well an opportunity for study of the grievances to discover the patterns into which they fall. Such records can be used as source material for much-needed studies by industrial psychologists.

It must be understood, however, that the writing is not the grievance. It should not be viewed as a pleading at common law, where the case falls if it is ineptly set forth. In short, the writing should be the point from which the parties begin in their search for the cause of the dissatisfaction, irrespective of the direction indicated in the writing.

6. *The grievance procedure must provide an end point at which the grievance is settled and a binding decision rendered.*

This is an obvious ingredient of a proper grievance procedure. Unless there is assurance that a complaint will terminate in a final decision, resort to the grievance procedure is meaningless and workers will turn from this way of seeking relief to more direct methods. Some few agreements provide an end point at the highest level of management. The difficulty with this prospect is that it really allows management, against whom the complaint is directed, to decide the complaint. To be sure, top officials of management may not hesitate to overrule the lower levels of supervision in minor cases, and indeed may welcome the opportunity of correcting bad practices brought to their attention through the grievance procedure; but this will not happen when the complaint involves a change inaugurated by the top official. In such cases the accused is also the judge. The futility of appeal to him is clear.

The grievance procedure must provide for final decision by an impartial person whose decision shall be accepted as final. This element gives a sense of security to the parties. It reassures the workers and their representatives that the adjustment of the grievance is not entirely in the hands of the employer. By its very presence in the agreement it disposes the parties to reach an accord themselves without resort to it. This is the overwhelming verdict of experience.[11]

[11] For further discussion of this aspect of the grievance procedure, see Frey, *The Logic of Collective Bargaining and Arbitration, infra.*

There are additional, though subsidiary, requirements of a well-balanced grievance procedure, such as the obligation of management to pay the stewards and members of the grievance committee for time lost while adjusting grievances, and to permit a business agent of the union to enter the plant for the purpose of investigating complaints and generally determining whether conditions in the plant conform to the agreement's terms. Both requirements come within the concept of "policing the agreement." Management should pay for time lost because employees who handle grievances, whether they be supervisors or production employees, are working as much in the interest of efficient operations as the maintenance crew who service and repair the plant equipment. Management should also permit a union business agent to have access to the plant during working hours, on proper notice to the company, because the expertise of the business agent in detecting likely trouble spots is invaluable. His experience and close relation to the men who are aggrieved, or in whom a grievance is forming, enables him to appraise its nature and, at times, to diagnose the source more swiftly than the men themselves. He is then in position to bring the matter to the attention of management before it develops into serious trouble. Manifestly, if he has the right to participate in the adjustment process at some stage, he must be accorded the right to view the scene. Because of these considerations the National War Labor Board, when called upon to decide a dispute over this phase of grievance procedure, has invariably ruled in favor of access to the plant by accredited non-employee union agents and officers.[12]

The incorporation into the collective agreement of a grievance procedure, properly designed according to the structural principles outlined here, works a reorientation of the attitudes of all parties. But collective bargaining does not end with the signing of the agreement. In a real sense, it is but the point of departure from which the parties may proceed to establish a sound relationship. The assurance of continous harmonious relationships thereafter depends upon the day-to-day operation. The success or failure of the grievance procedure in achieving mutual understanding depends upon the intelligence with which the parties apply it to the boundless variety of complaints. If the parties will accept the complaint as a symptom of discontent, and give it hospitable reception, it will shortly appear that specific actions and conditions evoke similar reactions from worker as well as supervisor. Thus patterns of human conduct will be traced which will suggest specific measures of prevention as well as treatment.

The compilation and appraisal of experience under grievance procedures have resulted in better understanding of the larger problems, and that understanding has, in turn, led to avenues through which an overloaded grievance machinery may be relieved of some of its burdens. The parties soon realize that types of grievances may be anticipated, and are consequently enabled, by the adoption of new contract provisions and other means, to translate their experience into more permanent and

[12] Lane Cotton Mills Co., 7 WAR LAB. REP. 281, 288 (1943).

satisfactory procedures to deal with specific causes of discontent, thus obviating in many instances the necessity for resort to the grievance procedure. For example, it is well known that every challenged discharge of a worker is difficult of reversal, irrespective of the justice of the complaint, because of the reluctance of management to reverse a disciplinary measure. Questions of prestige command priority over those of justice. Recognition of this obstruction in discharge cases, coupled with a desire to do justice to the discharged worker, has led some unions and employers to institute a system of "suspension-discharge." Under this procedure the employee is not peremptorily discharged but receives instead a notice of suspension-discharge which means that unless a protest is lodged with the employer within a specified number of days after the notice, during which period the worker may or may not be out of work, the suspension-discharge will ripen into final discharge. This technique appears to work well where it is in operation since it dispels the atmosphere of irrevocability which surrounds a discharge. If a protest is filed, the discharge is arrested at the point of suspension while the case is reviewed. Thus management at a higher level finds it possible to consider the merits of the case unencumbered by the retarding influence of prestige questions.

Similar results may be achieved in a more difficult field—that of work changes. Labor disputes growing out of changes in methods of production or technology are the most difficult of adjustment because they touch the most sensitive layers of the behavior patterns of workers. Changes disturb fixed working habits and arouse fear of the unknown and fears of diminished earnings, dilution of skill, or abolition of the job itself. Much progress can be made in overcoming this resistance if the employer will proceed to persuade the employees to assent by giving prior notice to them of the change and, through consultation, apprising them of the necessity for or desirability of the change, its nature and extent, and its effects upon their earnings, effort, and job security. Where changes have been preceded by these preliminaries, fears have been dispelled and assent more easily secured. As a result, measures in the nature of preventive hygiene have been inaugurated in many plants. They require that all technological changes be preceded by notice and disclosure of all relevant data and of the full program. Adequate assurances are given to protect the earnings of the employees and to provide a share for them of the savings resulting from the change. In return, the workers have agreed to a trial period during which they seek to accommodate themselves to the change. Thereafter, grievances may be filed and are processed under the established grievance procedure.

Similarly, grievances over rates of pay have led to co-operative analyses of wage scales and the formulation of a balanced wage structure in which comparable skills are equitably rewarded. Again, losses in earnings of piece or incentive workers, a continuous source of anger and grievance, has led to the adoption of a general principle whereby a worker is guaranteed a daily minimum or one which assures the worker's pay when time is lost because of faulty materials, machine breakage,

or other conditions beyond his control. Likewise, management has in many mills recognized the injustice of sending a worker home because of lack of work and has provided that an employee who reports for work on his regular shift, not having been given reasonable notice not to report, is entitled to receive four hours' reporting pay. These are but a few of the general rules which have been evolved to protect the worker and thus diminish the areas which nurture grievances.

These examples illustrate that in modern industry we are dealing with the entire complex of human behavior. Two basic prerequisites for the minimizing of labor disputes through the use of adjustment machinery have been postulated here. The grievance procedure which has been suggested is based upon a recognition of the nature of the labor union and upon the necessity for the establishment of a stable system of reviewable civil rights for workers in industry. These are most powerful purgatives of industrial unrest. The grievance procedure suggested takes full account of the interpenetrating relationships in industry where men, whose interests are both adverse and conjoined, live in close association. Management, which has directed the operation of the machine, must now turn its attention to the human problems in industry. To the extent that management takes cognizance of, and intelligently deals with, the individual employee and the group which he has formed to advance, preserve, and protect his interests, democracy, absent too long from the industrial life of our society, will develop and will relieve those tensions which are such a frequent source of industrial strife.

THE LOGIC OF COLLECTIVE BARGAINING AND ARBITRATION

ALEXANDER HAMILTON FREY*

Arbitration is regarded by some as a panacea for all labor controversies. To others arbitration of labor disputes is anathema. That there should be this extreme conflict of reaction is not surprising, for immoderate opinions are most common where there is least understanding, and few have made a searching inquiry into the nature of collective bargaining, without which the role of arbitration cannot be fully understood. The purpose of this article is to explore the thesis that (1) collective bargaining within the realm of labor relations is vital to the perpetuation of the American system of free enterprise, and (2) arbitration is an essential element in the successful functioning of the process which we have come to know as collective bargaining. Three fundamental assumptions underlie this thesis: first, freedom of enterprise—as contrasted with dictation by government or the state—is the basic American procedure for determining the uses to which the labor or the property of an individual are to be subjected; second, the traditional procedure of free enterprise whereby these uses are determined is a process of bargaining between individuals or groups of individuals; third, conditions which threaten the permanence of, or which seriously curtail, this bargaining process are dangerous encroachments upon our system of freedom of enterprise.

I

THE SIGNIFICANCE OF COLLECTIVE BARGAINING TO FREEDOM OF ENTERPRISE

"Bargaining," as that term is used herein, is the process whereby two persons with opposing interests arrive at, or attempt to arrive at, the terms of a sale;[1] where two or more persons act as a unit on one or both sides the process is referred to as "collective bargaining."

Whether the subject-matter of the transaction be property or labor,[2] a "bargain-

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[1] "Sale" is used herein in a broad sense to include transactions transferring use and possession as well as ownership, and also to include transactions from which there emerge terms embodied not in a contract but in schedules, standard clauses or provisions, rules, codes, etc.

[2] It has frequently been said that the labor of a human being is not a commodity. This statement means that when one person acquires the use of another's services there are moral and ethical factors involved that are not present in the sale of lands, chattels, animals or credit. Nevertheless there is no essential difference between the processes whereby the terms of a sale and the terms of an employment relationship are arrived at, and in both instances the term "bargaining" is used to describe the negotiations, if any.

ing" situation does not obtain between a buyer and a seller unless each is able to force upon the other some concession, some abandonment of a preferred position. The seller can exert very little pressure with respect to the terms of the sale unless there is some degree of scarcity, some limitation upon the supply of that which he seeks to sell. This is the first essential of "bargaining power." If the seller is offering something for which the buyer is willing to pay *a* price, i.e., which it is advantageous to the buyer to purchase at *some* price, the ultimate price which the seller receives, whether he controls all or only a fraction of the supply, depends upon the respective resources with which each of the parties can withstand a deadlock. In other words, if the seller has no capital, if he must sell to live, then—even in the extreme case where he controls the entire supply—he must accept the best terms offered, however far below what he regards as a "fair" price. Without some resources at the seller's command, there is no element of "give and take" in the situation. This is the second essential of "bargaining power."

The Industrial Revolution, i.e., the mechanization of the processes of production and the introduction of the factory system, brought about conditions which have terminated the ability of all but the most highly skilled workers to bargain individually with their employers on a basis of equality. In earlier times employer and employee belonged to the same community, attended the same church, participated in the same political activities, and were not very far removed in the economic scale. There was no great surplus of labor; if the terms of employment offered to a given employee by his employer were unsatisfactory, more likely than not the parties would talk face to face and reach an accord. Or if the terms were regarded by the employee as utterly unreasonable, he could do odd jobs for others, farm on his own land, and look forward to the security of at least subsistence for his family and himself for an indefinite period. And eventually either the employer would feel the need of his services sufficiently to modify his former offer, or the employee would find other satisfactory work in the same community.

But with the coming of the Industrial Revolution all this was changed. Great cities developed which were the centers of the factory system. The individual worker and his employer grew farther and farther apart socially and economically. The favorable atmosphere for personal conferences and adjustment of disputes disappeared. Mass-production methods resulted in huge concentrations of labor and in a great increase in the percentage of jobs not requiring skilled work. Thus unskilled workers are today the vast majority of those employed or seeking employment, and their labor has little or no element of scarcity. Moreover, whether skilled or unskilled, the individual factory worker normally has no capital with which to withstand a "buyers' strike." He owns no land, has no tools, and hence has few resources with which he and his family can hope to survive an extended deadlock with his employer over terms of employment. Furthermore, labor cannot be preserved and held for a more favorable market: a worker cannot tomorrow sell

today's unexpended labor. Nor does the labor of an individual worker have the fluidity that attaches to most commodities or to credit seeking a market: a workman and his family are effectively bound to a limited geographical area of job opportunity.[3]

In short, under modern industrial conditions the individual worker is powerless to bargain with his employer with respect to the terms of his employment. Acting alone, he has no practical alternative but to accept the terms offered to him. But through unionization the individual worker may be enabled to secure at least a measure of the two essentials of bargaining power. In the first place, unions provide a medium for concerted action by which the supply of labor available to an employer may be restricted, so that even unskilled labor in an era of unemployment will have some scarcity value. Second, unions constitute a potential source of that minimum of capital which the individual worker must have if he is to be able to resist at all when deadlocked with his employer over terms and conditions of employment.

In any given transaction there may be a considerable disparity between the bargaining powers of buyer and seller without any noteworthy effect upon our economy. Some inequality of bargaining power is the rule rather than the exception,[4] and our free-enterprise system does not concern itself with minor advantages that may accrue to the stronger party. But if there is an absence of bargaining power, or if a pronounced disparity of bargaining power develops as to a significant *class* of buyers (or sellers), then experience has taught that government will intervene, either by dictating to buyer and seller the terms of the sale (thus removing it from the traditional bargaining process of free enterprise), or by attempting to improve the bargaining power of the weaker side, so that the bargaining process, and the free-enterprise system, may continue to function without the injustice inherent in inequality.[5]

If it be conceded that under modern industrial conditions the individual worker, acting alone, has little or no bargaining power, then it must be recognized that he will endeavor to foster his interests by acting in concert with his fellow workers. And if workers fail in their efforts to bring themselves within the framework of our free-enterprise system by achieving collective bargaining power—and they had failed signally prior[6] to the passage of the National Labor Relations Act in 1935[7]—

[3] For an elaboration of this analysis see FREY, CASES ON LABOR LAW (1941) 1-6.

[4] For *equality* of bargaining power between buyer and seller there would have to be at least (a) equality of desire on the part of the buyer to buy *from the seller*, and on the part of the seller to sell *to the buyer* that which is the subject-matter of the transaction (i.e., the opportunities for the buyer to buy and the seller to sell elsewhere would have to be equal); (b) equality of resources of buyer and seller with which to withstand a deadlock; and (c) equality of pertinent knowledge and of skill in negotiating.

[5] Infancy law, usury statutes, and fiduciary standards are traditional examples. When emergency conditions disrupt the normal balance of bargaining power, temporary controls (as on rent, commodities, wages, etc.) are at times instituted.

[6] In 1935 the American Federation of Labor, after more than fifty years of existence, had less than 3,000,000 members, the C.I.O. was non-existent, and apart from the Railroad Brotherhoods there were no other nationally significant labor organizations.

[7] 49 STAT. 449 (1935), 29 U. S. C. §151 *et seq.* (1940).

then governmental intervention to promote the interests of a group of such proportions may be anticipated. In a society such as ours, dedicated to the perpetuation of a system of free enterprise, the function of government is not to displace that system but to protect it. Accordingly, the government has thus far sought to safeguard the individual worker not by dictating the wages to be paid to him, but by facilitating the development of organizations through which he may achieve the only kind of realistic freedom of enterprise available to him, namely, collective bargaining.

There can be little doubt that if the collective-bargaining endeavor fails significantly to bring about substantial equality of bargaining power between employers and employees,[8] then the government will be forced to attempt to aid whichever is the weaker side by dictating wages to be paid and received. Dictation by government of the terms of any sale (even the establishment of "floors" and "ceilings") tends to set off a chain of governmental actions which increasingly restrict the areas of free enterprise. This is particularly true with respect to the establishment of labor costs by governmental fiat, for in order to effectuate its wage policy the government would find it had also to concern itself with other costs and with prices, which in turn would involve profits, and the investment of capital, and the use of property, and the myriad decisions which are now reached by the traditional process of free bargaining.

If the alternatives are substantial equality of bargaining power for the individual employee in relation to his employer through the device of collective bargaining, or governmental dictation of wages and a congeries of related interests, then collective bargaining emerges as a potential bulwark of the free-enterprise system, and labor unions are seen as organizations having significance to society as well as to their own members. An understanding of the factors without which collective bargaining cannot succeed is of the utmost importance to the preservation of our national economy.

II

THE PREREQUISITES OF COLLECTIVE BARGAINING

Since the individual worker can bring himself within the framework of our free-enterprise system only by bargaining collectively, the first essential is that employers shall bargain with their employees only on a collective and not on an individual basis. Even though a group of workers form an organization and agree to negotiate only as a unit with a given employer or potential employer, they do not in fact achieve any bargaining power with reference to that employer so long as he is able to obtain an adequate supply of competent employees on his own terms by dealing individually with other, unorganized workers. Hence, if there is a sincere desire to

[8] Collective bargaining might fail either because employers succeed in reducing unions to an impotent state, or because unions become so powerful and arrogant as to make a mockery of bargaining negotiations.

have labor relations determined by a genuine bargaining process, and not by governmental fiat, it is necessary either that employers voluntarily refrain from dealing with individual employees for their labor except on terms that have emerged from collective-bargaining negotiations, or that employers be precluded from engaging in such individual transactions by virtue of the organization of substantially all available employees as members of one or more labor unions through which they will bargain only collectively.

The suggested self-restraint is hardly likely to occur: each employer (even corporations employing huge aggregates of workers) will discount the danger of eventual governmental intervention on a national scale because of the absence of genuine bargaining in *his* plant; each employer will convince himself that the terms and conditions of employment which he will unilaterally establish if the opportunity presents itself are fair and reasonable. Accordingly, it is difficult to escape the conclusion that bargaining as to labor relations can exist only if employers cannot obtain adequate supplies of labor except by first negotiating terms and conditions of employment with an association of workers organized to bargain collectively.

It must be borne in mind that, just as in an ordinary sale there is always a specific subject-matter of the bargain, so in collective bargaining the bargaining is as to the terms and conditions of employment of the employees in a given *bargaining unit*. A bargaining unit is not a union; it is a group of jobs. It may be the jobs connected with a particular machine or operation; it may be the jobs of a particular craft, such as painters; it may be the jobs in a particular department of a plant; it may be clerical jobs or production jobs; it may be all non-supervisory jobs in a given plant or in all the plants of the employer. Collective bargaining cannot proceed until the bargaining unit has been established, whether by prior practice or custom, decision of an administrative agency, or agreement of the parties. With reference to a given bargaining unit, there may be more than one union to which divergent groups of the available workers belong. If so, the employer will have a choice of organized sources of his labor supply with which to bargain collectively,[9] unless the operation of a labor relations statute controls his choice.

Even if the employer has, however, no choice but to deal with one union representing all of his employees or potential employees in a given bargaining unit, this does not place the employer in the unfair position of a would-be buyer of a commodity which has been monopolized by a single seller. The monopolistic commodity seller has many potential buyers to pit against one another, they being unorganized, while each individual buyer has, by hypothesis, no alternate seller with whom to deal.[10] A labor union is a bargaining agency only if the workers compris-

[9] The existence of such a choice would improve the employer's bargaining position, but it would also involve the risk of "jurisdictional disputes," a form of labor controversy which employers generally decry.

[10] Except where labor is involved, individual sellers and individual buyers are in general deemed to have comparable bargaining power. Hence, when unions of commodity sellers have been formed, government has sought, through anti-trust statutes, to restore the bargaining process by breaking up

ing it act as one man in selling their labor. The difficulty or impossibility which an employer encounters in finding another group of employees, when all are organized, is thus matched by the difficulty or impossibility which the union members, as a unit, encounter in finding another employer.[11]

This unitary aspect of organized workers is an essential element of collective bargaining. There can be no bargaining as to the sale of labor without the right to strike and to lock-out. Unless those available for work in a given bargaining unit are permitted to act in concert in refusing to work on the job or jobs involved in the bargaining unit, and unless the employer is permitted to withhold job opportunities from the members of the bargaining unit as a group, a bargaining condition as to labor relations cannot exist. There are several interesting corollaries to this conclusion. Where a condition of collective bargaining does exist, and the workers in a given bargaining unit embark upon an economic strike,[12] they ought not to be privileged to exert other economic pressure upon the employer, such as inducing or persuading third persons to cease or refrain from dealing with him, so long as he either does not or cannot obtain labor to replace that of the striking members of the bargaining unit; and a refusal by another employer to employ the strikers while the strike is in progress ought not to be adjudged an unfair labor practice on his part.[13] So-called "secondary" boycotts and sympathetic strikes are defensible, if at all, only in situations where the conditions of collective bargaining do not exist[14] or where the strike is provoked by a statutory unfair labor practice of the employer. If, however, the employer replaces the striking members of the bargaining unit with non-union employees, neither the strikers nor the unorganized replacements have any actual bargaining power, and almost inevitably the strikers will attempt to exert other forms of economic pressure upon the employer than the futile withholding of their own services.

Outside the field of labor relations, the equivalent of a strike or a lockout is a normal element in the bargaining process. When buyer *A* (usually a corporation) is unable to reach an accord with seller *X* (usually another corporation), buyer *A* refuses to deal further with seller *X*, or vice versa, and each seeks a seller or a

such combinations. With respect to individual sellers of labor government has attempted, through labor relations statutes, to re-establish the bargaining process by stimulating the development of unions of such sellers.

[11] The first element of bargaining equality is therefore present; i.e., the opportunities for the buyer to buy and the seller to sell *elsewhere* are equal.

[12] An "economic" strike is a strike to force wage or other concessions from the employer which he is not required by law to grant. A strike to induce an employer to abide by the requirements of the National Labor Relations Act (or of some other federal or state labor statute) is commonly referred to as an "unfair labor practice" strike.

[13] By reference to §§2(3), 7, 8(1) and 8(3), this would appear now to be a violation of the National Labor Relations Act.

[14] In many states there is no local counterpart of the National Labor Relations Act, so that, if interstate commerce is not affected, efforts to form a union and to achieve union recognition may be unsuccessful because no applicable statute deprives the employer of the devices, such as discrimination, which he is privileged at common law to use to thwart the establishment of a collective-bargaining organization among his employees.

buyer elsewhere. But, as indicated above, when a bargaining impasse occurs between an employer and a union, resulting in a strike or a lockout, there is normally no other seller (*i.e.*, the entire group of workers involved in the bargaining unit) for the buyer (*i.e.*, the employer) to turn to, and there is no other employer from whom the workers as a body can obtain employment. The accuracy of this statement is not affected by the fact that a few employees, as individuals, may be able to get some kind of temporary work elsewhere, or that the employer may be able to obtain a trickle of replacements for individual workers. If a strike develops in any plant in which the organized workers constitute a sizable segment of the community, the possibility of other jobs or other workers being obtained on a substantial scale is illusory. Consequently, so long as the deadlock continues, the parties have no alternatives but to wait each other out, or to resume negotiations with each other.

III

THE PUBLIC INTEREST AND COLLECTIVE BARGAINING

The vast body of consumers constituting the public has a very real interest in not having the production of coal, steel, transportation, automobiles, housing, food, and goods and services of many other sorts interrupted while employers and employees engaged in such production slug out their differences over labor relations. Consequently, there are recurring proposals for federal or state legislation aimed at precluding strikes and lockouts, at least in those situations in which the public interest is vitally affected.[15] But very few members of the public fully comprehend that there is no bargaining power available to most workers in modern industry unless those who can perform the jobs in a given bargaining unit are able to act as one man, and unless that "one man" is given the privilege which any individual has of refusing to work upon the terms or under the conditions proffered.[16] Too many employers are unmindful of the long-range probability that the absence of collective bargaining as to labor relations will lead to the destruction of their freedom of enterprise and the emergence of some form of state socialism or planned economy.

Here, then, is a perplexing dilemma: strikes which materially affect the production or distribution of essential commodities are inimical to the public interest, but

[15] If once such an inroad on collective bargaining were to be ordained, the omnivorous character of the concept of a "vitally affected" public interest can readily be imagined.

[16] This peculiar "unity" feature of collective bargaining causes the scope and the nature of the bargaining unit to be matters of grave significance. Far too little research and objective thinking has been devoted to a study of the appropriateness of various possible bargaining units; the test should be whether the unit chosen will produce the highest degree of bargaining equality with due regard for interrelated interests of others. Industry-wide bargaining may be appropriate in some industries and not in others. Some favor industry-wide bargaining as a method of taking wage rates out of competition, but this is illogical except perhaps as to the establishment of an absolute minimum wage for the industry.

Another most important outgrowth of this "unity" feature of collective bargaining is the matter of esablishing and maintaining democratic procedures not only as to the selection of the union to represent the bargaining unit, but also in the subsequent functioning of that union. Here, too, there has been a haphazard development and a dearth of sound planning.

legislation which curtails the right to strike, thus in effect eliminating collective bargaining, is not an expedient way to protect the public interest, for the consequences of the cure may too readily be worse than the disease. The situation is not, however, hopeless. There are two relatively untried avenues of approach to the solution of this dilemma. The first lies in an intensive and unremitting search for methods of improving the processes of collective bargaining, thereby bringing about a dramatic decrease in the number of ultimate disagreements, which are the sources of strikes and lockouts. The subject, which is beyond the scope of the present paper, is dealt with elsewhere in this symposium.[17]

Despite the gains that may be expected from wise legislation, from intelligent administrative procedures,[18] from a far better understanding and acceptance by the parties of their grave responsibility so to conduct themselves as not to endanger the institution of collective bargaining, no doubt there will remain an irreducible minimum of disagreements as to which the disputants are unable to negotiate a mutually acceptable solution. Within this area the protection of the public interest in the avoidance of strikes and lockouts lies in promoting measures which will encourage self-restraint on the part of both employers and organized labor—a not impracticable task, for together these groups constitute a preponderant part of the public.

If a buyer and a seller are fairly evenly matched as to bargaining power, there are several things that may happen: each may make some concessions, may recede somewhat from a preferred position, and thus an agreement may be concluded; or one may ultimately regard the other as so unreasonable as to render further negotiations futile, whereupon they will part company at least for the time being—the equivalent of a strike or a lockout in collective bargaining; or, while unable to agree upon one or more of the terms of their bargain, they may both consent to take a chance within defined limits by submitting the controversy to an impartial third person for final and binding determination. This last procedure is arbitration, and in it lies the major hope of preserving the bargaining process in labor relations, and thus of saving both industry and labor from the evils of domination by officialdom.

IV

THE FALLACY OF "COMPULSORY ARBITRATION"

Arbitration of labor disputes is an extension of collective bargaining,[19] for arbitration of any dispute occurs only when the disputants are relatively equal in bargaining power. If one of the parties to a dispute cannot afford to hold out for his contention, and the other suffers little or nothing by holding out for his, the stronger party, being in a position to prevail without risk of loss, will not agree to arbitrate.

[17] See Fairweather and Shaw, *Minimizing Disputes in Labor Contract Negotiations, infra.*

[18] Governmental measures concerned with promoting conditions within which the traditional bargaining process can operate are desirable, for such measures tend not to displace the free-enterprise system, but to protect it.

[19] Since arbitration is an adjunct of collective bargaining, it cannot be a panacea for all labor troubles. In numerous areas collective bargaining is still non-existent. Many strikes, and much picketing and

This is the situation in which a worker not fortified by the collective strength of a labor organization finds himself, and there are few, if any, instances in which a dispute over terms of employment between such a worker and his employer has been submitted to arbitration.

The situation is ripe for arbitration when the parties to a dispute have exhausted their efforts to find a mutually satisfactory settlement, and yet each believes that the risk of detriment sure to result from a prolonged deadlock is greater than the risk of detriment that may result from a not wholly favorable determination of the dispute by an impartial third person. In consenting to arbitrate, the disputants, although unable to agree upon a solution of the substantive issue, do agree upon a procedure for resolving it. When used in this sense, the term "arbitration" refers to a voluntary process; it is a consensual matter, and "compulsory arbitration" is a contradiction in terms.

There is current agitation for legislation that will subject all types of labor disputes to a required, peaceful procedure for reaching a binding decision of the controversy, in place of the war of attrition in which the disputants may now indulge to the detriment of innocent third persons and the public at large as well as themselves. The term most commonly used to summarize this idea is "compulsory arbitration," and this usage will be adopted throughout the remainder of this paper. The waste and the inequities which follow in the train of any prolonged combat over terms or conditions of employment are deplorable. Hence there is a strong appeal in the proposal that such strife be outlawed by compelling the combatants to refrain from direct action against one another, or against third persons, and to abide by the decision of a court or administrative agency, or other impartial body or person, as to the merits of the substantive issues. Despite its appearance of reasonableness, this suggestion of "compulsory arbitration" is open to several objections.

In general, when a status of collective bargaining does exist between employees and their employer,[20] labor disputes are of two types. There are disputes concerning the interpretation and application of one or more provisions of an unexpired contract between employer and union. These disputes are commonly referred to as "grievances."[21] The other class of disputes consists of disagreements as to the terms

boycotting, are organizational in character: efforts to bring about the formation of a union, to achieve union recognition, and thus to establish a status of collective bargaining. Here arbitration cannot be the path to peace, for the essential conditions of an agreement even to arbitrate are lacking. The problem is not one of settling a dispute between parties with bargaining power, but of correcting an absence of genuine bargaining. Such an impasse is beyond the scope of arbitration. But here, too, there is room for constructive effort. Intelligent legislation, courageous and enlightened action by labor unions and trade associations, co-operation on the part of influential, public-spirited citizens—by these and other measures much might be done to minimize the force, violence, coercion and loss which too frequently accompany the effort to achieve a collective-bargaining status for unorganized workers, or to enlarge the jurisdiction of an established union.

[20] Jurisdictional disputes and disputes concerning the formation or recognition of a union are outside the framework of collective bargaining.

[21] The term "grievances" as herein used is not confined to claims under a trade agreement asserted by or on behalf of an individual employee; the disputed interpretation may relate to an entire group of employees (e.g., whether a stipulated holiday is with or without pay), or may involve a conflict between the union as such and the employer (e.g., whether the trade agreement permits the revocation of individually signed "check-off" authorizations).

and provisions to be included in an agreement which employer and union have been attempting to negotiate. In this symposium these are termed "contract-negotiation disputes."

There are three outstanding distinctions with respect to these two types of labor disputes. In the case of a grievance, one party accuses the other of having violated the clear meaning or the reasonable interpretation of an agreement which they have jointly negotiated, and the language of the agreement or the proceedings leading up to it provide some standards within which the settlement of the dispute may be confined. The jurisdiction of a court of law or of equity extends to disputes of this category. General or special agreements for the ultimate arbitration of grievances are increasingly common.

But when the controversy is the inability of the parties to achieve a meeting of the minds, their failure to agree at all as to a specific matter (and not merely their lack of agreement as to the application of that to which they did agree), there is no frame of reference guiding or delimiting the search for a solution. Although daily thousands of individuals or corporations are unable to agree upon the terms of a proposed bargain, jurisdiction over such disagreements has not been conferred upon courts of law or equity. Except in a few industries, such as mass transportation, arbitration of labor contract-negotiation disputes is not a frequent occurrence.

The foregoing distinctions reveal that the major failure of collective bargaining is in the realm of contract-negotiation disputes. If legislation were to be enacted for the "compulsory arbitration" of such disputes, by what standards would the issues be decided, especially when a novel demand is made?[22] Of course, it is conceivable that the legislature might enact statutes imposing standards to be applied by the prescribed adjudicator in ordering the settlement of at least the more common subjects of such labor disputes. But by what principles, other than political expediency, would the legislature be guided in establishing such standards? "Compulsory arbitration" would inevitably manifest the evil of government by men and not by law. Moreover, "compulsory arbitration" would soon result in the disappearance of bargaining between employers and organized labor, for the party favored by the foreordained standards in a specific dispute would subject the other party to the compulsory procedure, instead of attempting painstakingly to work out a voluntary agreement.

Instead of enacting rigid standards for judicial or quasi-judicial settlement of labor contract-negotiation disputes, the legislature might create a peacetime equivalent of the National War Labor Board and authorize it to be the final arbiter of such disputes. If such a board or commission or agency were to promulgate a set

[22] "Novel" demand means a demand as to which there exists no precedent within the industry or area. Perhaps the main reason for labor's hesitation to accept even voluntary arbitration as a universal remedy for contract negotiation disputes is its fear that by this process it will not be able to achieve what it regards as "social gains," such as an annual wage, health benefits, etc., because any acceptable arbitrator will be highly conservative in his decisions as to such matters.

of standards, or arrive at them by a series of precedent-making decisions, substantially the same undesirable conditions would result as from a legislative code. And if the board should try to avoid these pitfalls by proceeding strictly on an *ad hoc* basis, thus keeping potential litigants in a state of complete uncertainty, it would soon find itself in an untenable position. Either it would be driven out of existence by charges of inconsistency, partiality and prejudice, or it would atrophy from inactivity.

A still more vital objection to "compulsory arbitration" of disputes concerning the establishment of terms and conditions of employment is that such a process would be more inclined to provoke disputes than to eliminate them. The employment relationship is a continuing one. In an ordinary sale an exchange of property for price is consummated and the parties separate until such time as they may wish to engage in another transaction. But an individual worker does not sell his labor in one clump to his employer. He delivers it throughout each minute of an indefinite and often prolonged period of employment; and what the employer receives is a variable, for the quality of the work delivered will inevitably be affected by the worker's attitude toward his job, his boss, and the terms and conditions of his employment. Employment is somewhat like marriage, even if it be a shot-gun wedding. The employer and his employees have to live together. When they negotiate as to terms of employment, the important effort is not merely to execute *a* contract; it is to arrive at a set of working conditions which they will find mutually satisfactory as they go on living together. A procedure to which either the employer or his organized employees do not willingly submit, and out of which there emerge for the employment relationship decreed terms with which one of the parties (or possibly both) does not agree, is ill-devised to produce a mutual feeling of fair treatment. Without such a feeling low morale, petty bickering, suspicion, distrust, and their disruptive effects are unavoidable. At best the losing party will insist upon a highly technical interpretation and application of the order in an effort to minimize its detrimental effects, and will strive to bring about new or border-line conditions as a basis for challenging its continued applicability. Litigation will multiply, and increasingly the time and attention of both employer and employees will be focused on court or board proceedings to the detriment of their joint task of production.[23]

Finally, the major objection to any form of "compulsory arbitration" is that its enforcement would be impracticable. The urge for a *compulsory* settlement of labor disputes derives from a desire for an antidote to strikes. A law providing a compulsory procedure for establishing disputed labor terms is infinitely worse than no such law, unless it is enforced. Successful defiance of the decree of any law-enforcing agency is a social evil, as it encourages disrespect and disdain for all law and legal procedure. If the authorized court or board were to direct a body of

[23] The magnificent record of the National War Labor Board might seem to refute these dire predictions. But the very fact that it operated under wartime conditions of intense patriotism, government financing, and extreme labor shortages explains the absence of significant resistance to its orders. Former members of the board are themselves among the foremost opponents of a prolonged extension of such compulsory procedures to a peacetime economy.

employees to work for, and the employer to pay, stipulated wages, how could such a decree be made to accomplish its purposes of precluding an interruption of production, if either the workers in concert refused to work for the designated rates of pay, or the employer refused to keep his plant open on the terms decreed? It is possible, barring constitutional objections to "involuntary servitude," that the recalcitrant workers might be induced by threats of jail sentences or other penalties to work, but not to work *effectively*. It is possible, barring constitutional objections to the taking of private property "without due process of law," that the government might seize and attempt to operate the plant of an intractable employer. But neither of these sanctions could be widely utilized without drastic encroachments upon our system of free enterprise. Any attempt on a national scale to direct and enforce wage rates (to say nothing of other terms of employment) would open a Pandora's box of government regulation, for the government would find that it could not avoid concerning itself with such related matters as prices and profits.[24]

V

THE MERITS OF VOLUNTARY ARBITRATION

It has been indicated that there are four principal reasons why "compulsory arbitration" will not provide an acceptable solution to the problem of finding means for the peaceful settlement of deadlocks between an employer and a union arising out of labor contract-negotiation disputes. They are: (1) the minimizing effect of "compulsory arbitration" upon genuine bargaining by the disputants; (2) the absence of standards without which the adjudicator could not avoid being (or at least seeming to be) either arbitrary or reactionary; (3) the tendency of "compulsory arbitration" to increase rather than to diminish disputes, because of the probable reluctance of at least one of the parties to "live with" the adjudicator's order; and (4) the impracticability of enforcement of the decree. In view of the belief heretofore expressed, that the most hopeful prospect for industrial peace lies in recourse to voluntary arbitration, it may well be asked whether these objections do not apply equally to voluntary arbitration. The answer is to be found in an analysis of this institution.

Arbitration being a voluntary procedure, the first essential is an agreement of the parties to arbitrate. Hence arbitration, far from representing a breakdown of collective bargaining, is an outgrowth of it. Normally, arbitration of the terms of a disputed labor agreement results from a special stipulation entered into by the parties. If neither party is under any duty to submit an eventual deadlock to arbitration, an effort to achieve a mutually satisfactory settlement through extensive collec-

[24] With respect to "grievances" (as distinguished from labor contract-negotiation disputes) redress may now be sought through ordinary court procedures for the settlement of alleged breaches of contract. Judges in courts of general jurisdiction are, however, seldom well trained in labor relations or adequately acquainted with industrial problems. If their functions were confined to this category of labor disputes, special labor courts or boards might be preferable to existing judicial institutions, especially if speed and flexibility of decision, now unattainable, could be achieved by them.

tive bargaining usually precedes the execution of an arbitration stipulation. If, however, at the very outset of contract negotiations the parties are already bound by a prior agreement to submit future unresolved disputes to arbitration, this agreement may have somewhat the same minimizing effect upon the process of collective bargaining as a statutory requirement of "compulsory arbitration." But anticipatory agreements to arbitrate labor disputes other than "grievances" are extremely rare, and in any event do not have the indefinite duration of a statute establishing a system of "compulsory arbitration."

One of the chief merits of voluntary arbitration, as contrasted with any compulsory procedure, is that the disputants jointly control the selection of the person or persons to be entrusted with authority to decide the issues in dispute. When the deadlock relates to the substantive provisions to be incorporated into an agreement between the employer and the union (and is not merely a "grievance" or other dispute as to the application of an existing contract), a common, and a preferable, practice is to utilize a board of arbitrators instead of a single umpire. For such a board each of the parties designates one or possibly two members, and then an impartial chairman is selected.[25] When such a board functions efficiently, arbitration is more than just an outgrowth of collective bargaining, it is a continuation of the bargaining process. After the case has been heard and the record is complete, the members of the arbitration board go into executive session, and the designees of the employer and of the union, with the aid of the chairman, engage in much the same process of discussion and negotiation as is represented by genuine collective bargaining at its best. In my own experience as an arbitrator, I have been quite surprised to discover that in a majority of cases, each involving a complex of contract issues, the members of such tri-partite boards of arbitration have been able to arrive at unanimous decisions on all issues.

Furthermore, in voluntary arbitration the very fact that the process is a consensual one enables the parties to overcome to some extent that absence of acceptable standards which plagues "compulsory arbitration." In jointly selecting the arbitrator, the parties act with knowledge of his character, his training, his experience and his predilections. Thus to the extent that his standards may be anticipated the disputants mutually adopt them as their own. Moreover, the authority of an arbitrator springs solely from the arbitration agreement of the parties, and in that agreement they can jointly establish certain standards by which he is to be controlled. For example, they can stipulate whether or not "ability to pay" is to be a factor in determining wage rates; they can define the industry and the area within which interplant comparisons may be made; and in various ways they can control the matter of

[25] Usually the representatives of the employer and the union either select the chairman by joint agreement, or they delegate his selection to the other board members designated by them. If the parties cannot reach an agreement upon the choice of a board chairman by either of these methods, they may then appeal for suggestions to such bodies as the U. S. Conciliation Service, the American Arbitration Association, or a state mediation board, or they may authorize one of these bodies, or a trusted federal or state judge, to make the selection.

standards to an extent not possible under a compulsory procedure, where one disputant can haul the other before a judge or administrative agency having authority to order settlement of the issues in dispute in accordance with the provisions of a statute from which alone such authority is derived.

In "compulsory arbitration" the decision is equivalent to a judgment rendered by a court, and the losing party will frequently feel aggrieved and justified in evading the result as much as possible. The outcome of a voluntary arbitration, however disappointing the award may be to one or both of the parties, is not nearly so likely to have this dispute-generating aftermath. In agreeing to arbitrate, the disputants in effect execute a contract with some blank terms in it; they authorize the arbitrator[26] to fill in the blanks for them, and what he fills in becomes *their* contract. Thus the same morality that recognizes the sanctity of a contract also sustains an arbitration award. A governmentally enforced decree does not enjoy a similar ethical standing.

As far as enforcement is concerned, experience indicates that, in labor disputes, defiance of an order emerging from compulsory proceedings is far more frequent than non-compliance with the award of an arbitrator whose authority is created by joint agreement of the disputants. There are familiar instances of defiance by workers and their unions of court injunctions, and of non-compliance by employers with orders of such administrative agencies as the National Labor Relations Board and the National War Labor Board. But there have been very few occasions upon which either the losing union or the losing employer has failed to abide by the outcome of voluntary arbitration proceedings. Should enforcement become necessary, whatever sanctions are practicable in the case of "compulsory arbitration" can also be made available with respect to voluntary arbitration.

If, as the foregoing analysis has indicated, the merits of voluntary arbitration far outweigh those of "compulsory arbitration" as a method of settling deadlocks over terms and conditions of employment, it would seem apparent that the public interest lies not in seeking more effective sanctions for the enforcement of governmental decrees, but in encouraging and facilitating resort to voluntary arbitration by both employers and unions.

VI

THE OBSTACLES TO VOLUNTARY ARBITRATION

Unquestionably the traditional reluctance of employers and unions to arbitrate contract-negotiation disputes stems from suspicion as to the impartiality and competency of any arbitrator whom the other side may propose, and from understand-

[26] Throughout this article the term "arbitrator" is used to refer either to a sole arbitrator or to the majority of a multiple board of arbitrators. Occasionally an arbitration stipulation establishing a multiple board provides that the chairman alone shall render the decision, if at the conclusion of the proceedings the other arbitrators are unable to agree upon a solution. This is done in an effort to avoid *pro forma* dissents. In "grievance" arbitrations such a procedure may have some merit (although a single arbitrator would be adequate), but in the arbitration of contract-negotiation disputes it is, in my opinion, preferable to provide for decisions by majority vote of a tri-partite board.

able hesitancy to agree to a "blind date" with an arbitrator to be designated by some third person. If voluntary arbitration is to become an effective final stage in a process of genuine collective bargaining, some way must be found to overcome this stumbling block.

Fortunately, a far greater number of competent arbitrators is available today than ever before. During the war hundreds of public members of boards, commissions, and panels, under the auspices of the National War Labor Board and other agencies, had the opportunity and responsibility of dealing with all phases of labor disputes day in and day out throughout the nation. In this way scores of these public representatives have acquired a practical experience in labor relations which sometimes transcends even that of management and union negotiators.

The real problem is no longer a lack of competent, impartial arbitrators. What is needed is a change in the outlook of both company and union representatives concerning the qualifications of an arbitrator. It is a fair presumption that, although they may be deadlocked over certain matters that may be of vital concern, each of the contracting parties wants a contract that *both* will thereafter find to be reasonably acceptable. Self-interest would therefore indicate that each party should make no effort to induce the other to agree to an arbitrator from whom a biased, lop-sided award might secretly be expected. Moreover, a greater willingness to take some chances in the selection of an arbitrator must be developed by both sides.

Honesty and fearlessness are, of course, requisites for any arbitrator. An agreeable personality is highly desirable. In addition, astuteness, and experience which will enable him readily to comprehend and to evaluate the respective contentions, are important assets. But all too often the parties, while insisting upon these qualities, also appear to expect their choice to fall upon a man who is a complete blank with respect to political, social, economic or other predilections! This attitude reminds one of the saying, "Why be difficult when with just a little more effort you can be impossible?"

In every community there are some men whose training has been such as to develop in them intellectual honesty—a capacity for suppressing preconceptions and arriving at conclusions on the basis of objective considerations, especially when confronted with the responsibility of deciding the fortunes of others.[27] No arbitrator is infallible. Mistakes and even prejudices will from time to time prove detrimental to one of the parties. But it is easy to magnify the dangers and to forget that the alternatives to arbitration as a solution of a deadlock—strikes, lockouts and their concomitants, or possibly governmental intervention—can be far more devastating.

Another impediment to the adoption of arbitration as a method of arriving at terms and conditions of employment is that by the time the need for arbitration develops the disputants may not be in a temper to agree on anything. When the

[27] If adequate tests are developed and properly administered, a body such as the United States Conciliation Service, the American Arbitration Association, or a state mediation board can render important service to disputants by sifting out potential arbitrators worthy of their consideration.

representatives of an employer and of a union have engaged in extensive negotiations as to the substantive provisions of a proposed trade agreement, and when they finally become deadlocked over certain of these matters despite prior concessions on each side, a "last ditch" attitude may have been built up which will minimize the likelihood of agreement upon the details of arbitration procedure.

Where a sincere effort at agreement through collective bargaining has been made, the deadlocks that emerge may generally be accounted for in one of two ways: either one side regards the final offer of the other on the remaining issues as unreasonable, or the final offer of the other side, though not in fact regarded as unreasonable, is unacceptable for collateral reasons.[28] Having arrived at what are believed to be sound reasons for resisting further concessions concerning the substantive terms of the bargain, a party may then make the mistake of accepting these "sound reasons" as also justification for refusing to agree upon a process different from direct negotiation for reaching a settlement. In as much as agreement to the substituted process is not agreement to the substantive terms proposed, different considerations should affect each. Indeed, the more unreasonable one considers the ultimate position of his adversary, the more willing he might be expected to be to submit the dispute to the judgment of an impartial third person.[29]

Finally, some employers and some unions are "gun-shy" with respect to arbitration because of a past unhappy experience, which may have resulted from a failure to appreciate the nature of arbitration proceedings. I believe that when the parties to labor contract negotiations become deadlocked, they should readily agree to arbitrate. But by "arbitrate" I do not mean merely that they should get up before some casually chosen third person and seek to influence him by heat and emotion rather than by facts and reasoning. Arbitration, though less formal, is somewhat like a court proceeding. It is always highly desirable to enter into a written stipulation to arbitrate. There being no pleadings as in litigation, the stipulation should contain a detailed statement of the issues in order that there may be no misunderstanding as to the jurisdiction of the arbitrator. In formulating the stipulation to arbitrate the parties should make every effort to agree upon the inclusion of standards, conceded facts, or any other matter that would facilitate the work of the arbitrator.

Above all, before presenting the case to the arbitrator each side should be prepared to the hilt: relevant and sufficient facts should have been assembled; where they will be helpful, charts, diagrams and tables should have been prepared; the examination of witnesses should have been carefully thought out. And the chief reliance should be on facts rather than upon bald argument. When arbitration pro-

[28] At times a union representative will refrain from indicating his agreement for fear of being charged by his constituents with having "sold out"; sometimes the employer representative will withhold his assent because the issue in question has become a matter of "principle" with employers generally, and a sense of class loyalty holds him in line.

[29] Arbitration is also sometimes a face-saver for those who find themselves in an untenable position with no graceful exit.

ceedings are conducted in this spirit and with this degree of preparation, it becomes almost impossible for a competent, conscientious arbitrator to do substantial injustice to either party.

I believe that there are no more important people in the United States today than those, who, on both sides of the table, have been entrusted with doing the bargaining as to terms and conditions of employment in just a few industries, such as coal, oil, steel, and transportation. Their importance lies not in the fact that their decisions can materially affect the people and the interests they respectively represent, but in the extent to which their conduct may forever affect the freedom of millions whom they do not represent. If collective bargaining does not work in these key industries, if the negotiators are unable to agree upon labor relations, or even upon a procedure for resolving disputed issues, if much needed production is seriously and frequently curtailed while the parties sulk in their corners (even if they do not engage in miniature civil war), government will surely intervene, a succession of regulations, controls and dictates will follow, and freedom of enterprise will become a historic memory.

The responsibility resting upon a handful of negotiators is colossal. Stupid men do not achieve such positions; and no sane man would consciously, through either stubbornness or greed, invoke so great a national disaster. I thoroughly believe that those who occupy these vital posts in both labor and industry have every reason to desire the perpetuation of a system of freedom of enterprise, of freedom from state dictation. I am not so sure that they have yet come to realize the terrible concatenation of events that willful or selfish attitudes on their part can project. But this they must be brought to understand; and when they do, collective bargaining will on both sides be carried on with a much greater eagerness for agreement. Few unresolved disputes can survive negotiations conducted in this spirit. As to these occasional deadlocks the negotiators will be fully conscious of their grave responsibility to society. One may confidently predict that from such a bargaining atmosphere voluntary arbitration will emerge as the generally accepted final step in labor contract negotiations.

THE ECONOMICS OF WAGE-DISPUTE SETTLEMENT

JOHN T. DUNLOP*

"The science of political economy is essentially practical, and applicable to the common business of human life. There are few branches of human knowledge where false views may do more harm, or just views more good."[1] Ever since Malthus penned this high estimate of his chosen discipline there have been doubters and blasphemers.[2] While there have been notable advances in quantitative economics, the application of economic theory or principles to particular situations is a rudimentary craft. Serious economists have rarely been attracted to a practice, except in such a period as that of the recent war.

While the professional economist has tended to avoid the market place, participants in the world of affairs have borrowed liberally of economic ideas to rationalize their positions. As a consequence, never were economic clichés and slogans so widespread and so frequently utilized in public argument. It is doubtful if there is any greater real understanding of problems; there may be less. Mill's judgment of his day probably fits our own: "I do not perceive that in the mental training which has been received by the immense majority of the reading and thinking part of my countrymen . . . there is anything likely to render them much less accessible to the influence of imposture and charlatanry than there ever was."[3]

The debate over wage rates in the public press and in proceedings between management and labor organizations has popularized economic analysis. There has come into use a limited number of clichés or standard arguments which are employed by the side that regards them as most effective at the time in winning the case. Illustrative of these phrases are "comparable wages," "productivity," "cost of living," and "ability to pay." These slogans are not the distinctive trademark of any one side. Either party may use one of these arguments today and repudiate it tomorrow as a factor in wage determination under a different set of circumstances. Current wage argument is a "dreadful pudder o'er our heads."

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[1] T. R. MALTHUS, THE PRINCIPLES OF POLITICAL ECONOMY (London School of Economics and Political Science Reprint, 1936) 9.

[2] For a recent discussion, see ELTON MAYO, THE SOCIAL PROBLEMS OF AN INDUSTRIAL CIVILIZATION (1945) 34-56.

[3] JOHN STUART MILL, THE SPIRIT OF THE AGE (Chicago University Press 1942) 10-11.

The interest in arguments and slogans in wage negotiations has increased spectacularly in recent years with the growth of private arbitration, the participation of government in wage setting through the machinery of the Railway Labor Act, the wartime experience under the National War Labor Board, and the postwar vogue of fact-finding boards. The employment by management and labor organizations of technicians, such as lawyers, economists, statisticians, actuaries, industrial engineers, and publicists, who produce voluminous briefs and endless statistical appendices, has given wide currency to such wage-determining principles or slogans.

The subject of this paper might be developed along several entirely different lines. The emphasis might be placed on developing an explanation for wage determination under collective bargaining.[4] It has seemed more in keeping with the spirit of this symposium rather to appraise carefully and rigorously some of the more prominent arguments and slogans used in wage discussions. Much of the discussion will be devoted to exploring problems that arise in giving meaning to these standards and in translating them into definitely measurable guides to decisions in particular situations. The problems will be found to be stubborn and not always tractable. This emphasis is not, however, fundamentally defeatist with respect to the contribution of economics to wage dispute settlement. The identification of problems is the beginning of economic wisdom.

The orientation of the following pages is primarily on standards seriously proposed in particular cases. The discussion of the appropriate general level of wage rates for the economy as a whole has resort normally to a different group of criteria. The first four sections which follow organize the problems associated with the application of four standards for particular cases: "comparable wages," "productivity," "cost of living," and "ability to pay." A following section summarizes the fundamental problems raised by an examination of these standards. A brief sixth section is devoted to the criteria used in discussing the general level of wage rates. The final section appraises the distinctive contribution which the economist may make to the settlement of wage disputes.

I. COMPARABLE WAGE RATES

No argument is employed more frequently in wage discussions than that wage rates in one bargaining unit should be equalized with, or related by a particular differential to, wage rates in other "comparable" bargaining units. While other arguments are more decisive in the "key" wage bargains in basic industries affecting the general level of wage rates, the appeal to comparable rates is frequently employed in transmitting the impact of these critical decisions throughout the rest of the wage structure. The resort to this standard is also frequently the basis for the numerous changes in differentials that are made among occupations, plants, and industries each year.

[4] See JOHN T. DUNLOP, WAGE DETERMINATION UNDER TRADE UNIONS (1944) chaps. 2-6.

The principle that wage rates in one bargaining unit should be adjusted to the level of wage rates in comparable plants has an alluring simplicity. The economist indicates that in equilibrium the same wage rate will be paid in "a market" for a specified type of labor service. The slogan of "equal pay for equal work" commands wide support. However, for reasons which will now be surveyed, the illusion of simplicity vanishes in the attempt to give meaning to the concept of "comparable" wage rates in any particular dispute situation.

(1) The content of job classifications designated by the same job title varies widely among different employers. The range of duties assigned to a single worker has not been as standardized among plants as is widely assumed. The varying ages and types of equipment, the differing scales of operation between large and small plants, and the different techniques of various managers are factors making for different job contents among firms producing roughly similar goods. Various arrangements may be made, for instance, in machine operations for the cleaning, oiling and greasing of equipment. The flow of materials to a machine and the handling of processed parts and waste products permit different plans of organization. The extent of supervision and inspection in a job may also vary widely from one plant to another.

For instance, a study of the distribution of spinning-room duties in forty-seven cotton textile firms[5] divided the work of five customary job classifications—spinner, cleaner, oiler, sweeper and doffer—into twenty-five separate operations. No two of the mills divided these operations in the same way among the job classifications. Except for the operations of "creeling" and "piecing up," performed by the spinner in all cases, no operation was assigned to the same job classification in all mills. The total duties of the spinner varied from these two operations in one mill to as many as ten in another. The comparison of the wage rates by job classification among these various cotton textile mills under these circumstances requires temerity.

At the request of the United States Conciliation Service in particular disputes, the Bureau of Labor Statistics has made a number of surveys of occupational wage rates in comparable establishments. The most recent of these studies examines the differences between duties among the various firms studied. The ordinary occupational wage-rate survey of the Bureau of Labor Statistics[6] starts with a single description for a "standardized" job classification. As long as a common core of duties is performed, the wage-rate data are collected from a particular firm and compared with rates from other firms. The newer special studies for the Conciliation Service recognize that there are wide variations in the actual content of jobs which roughly fit the same job description. These inquiries uniformly reveal the same range of diversity in job content illustrated by the distribution of spinning-room duties.

(2) Comparability in wage rates is impaired by variations in the method of wage

[5] Presented as an exhibit before the National War Labor Board in the cotton textile cases decided Feb. 20, 1945, 21 WAR LAB. REP. 793.

[6] *Wartime Wage Movements and Urban Wage-Rate Changes* (1944) 61 MO. LAB. REV. 684-704.

payment. Some workers and job classifications are remunerated on an hourly rate basis, others are on individual piece-rates or incentive rates, while still others are paid on group incentive plans. The content of job classifications may be identical, but the amount of services performed and purchased will ordinarily vary with the method of wage payment. Commission methods of wage payment add the further complexity of variations in the price structures of the products being sold. Among incentive systems there are substantial differences in the definitions of the "standard performance" and the extent of "incentive pull" for additional output. The provisions regarding minimum guarantees, including rates for machine breakdowns, poor materials, etc., and the method of calculating these guarantees—by day, by week, or other period—affect the meaning of inter-plant comparisons of wages.

(3) The influence of regularity of employment upon wage rates must be assessed in defining comparable wages. The level of rates for maintenance occupations with steady employment is frequently, although not always, below the rates for the same crafts engaged in seasonal construction work. While there are some important differences in job content, the regularity of employment is usually indicated as the principal reason for this difference. The difference between wages of mechanics in the repair shops of taxicab and truck companies and those of their fellow-craftsmen in commercial garages also reflects the factor of regularity of employment, although job content and methods of wage payment also differ. In fact, wage rates in "captive" departments of a company with relatively steady work opportunities are typically below those of the "outside" or "contract" firm with greater fluctuations in available work. Comparison of two groups of employees for wage-setting purposes will be complicated by the task of assessing the extent to which wage rates reflect differences in the regularity of employment.

(4) The terms and conditions of employment typically include not only the occupational rate but also other "money" conditions such as shift premiums, vacations and holidays with pay, sick leave, pensions, social and health insurance, paid lunch periods, Christmas bonuses, etc., to mention the more prominent terms.[7] The total contract of employment involves many other items that are less immediately "money" terms, such as union recognition, seniority, management rights and grievance machinery, and arbitration. In the bargaining process there is frequently give and take among the "money" terms. There is likely to be substitution among basic rate adjustments and shift premiums, vacations, and health insurance plans. There may even be important trades between the "money" items and other provisions of a contract. Comparison of wage rates under these circumstances may become particularly tenous.

(5) The geographical implications of "comparable wages" can be most perplexing. The concept of a "labor market" has no direct correspondence in geography.

[7] The Bureau of Labor Statistics now reports much data of this kind in connection with wage rate surveys on form OWR-17.

Specifying the labor market in accordance with the cost of transportation or the knowledge of job and wage opportunities does not yield precise results. The inclusion of suburbs and satellite communities can be as difficult as the grouping of larger towns and cities. The War Labor Board for the Boston Region was plagued throughout the war with the question whether to include Torrington (16 miles away) in the Waterbury, Connecticut labor market for metal trades occupations. The areas of uniformity of wage rates may vary widely among occupations even in the same industry: compare laborers and iron workers in the construction industry. The areas of uniformity have in general spread in recent years, although uniformity appears to be greater in periods of high employment than in loose labor markets. If the standard of comparable wages is to be employed we cannot escape the difficult task of defining the geographical limits of the appropriate labor market.

(6) The complications of "comparable" wage determination developed so far in this section relate to labor-market difficulties. They derive from relating the exact work performed by the wage earners in different bargaining units or from the influence of what are essentially labor-market influences on wage rates. There is another group of problems which must be faced in giving meaning to "comparable wage rates." These have their roots in the product market, or, more precisely, in the divergent competitive positions of the firms employing the wage earners.

Business enterprises are ordinarily regarded as clustering into industries, segments, or smaller groups among which product competition is relatively closer than with firms outside the group. But every business, outside the case of a few perfectly competitive markets, has its specialized market and clientele. The grouping of firms according to similarity of product-market conditions is a convention always subject to further subdivision. The definition of these clusters of "comparable" firms is probably as difficult as any issue in applying the wage standard discussed in this section.

The local transit industry includes primary and feeder-line companies; hotels are classified into first-line and several other classes; bakeries may be divided into large-scale operators and specialty shops. Are the larger or smaller units appropriate for comparison? The trucking firms in an area may be subdivided into over-the-road and local trucking enterprises. The latter may be classified in turn into product groups—oil, coal, grocery, department store, express, etc. Any one of these groups, such as oil, in turn could be further subdivided into: national distributors, local companies, home delivery, industrial uses, etc. While many of these groupings are associated with important differences in job content (type of equipment) and method of wage payment, competitive conditions among these various groups no doubt vary widely. The important question is to determine when these differences in competitive conditions are so significant as to warrant a separate wage determination regardless of labor-market influences.

The problem may be posed even more sharply by an instance in which labor-market influences are relatively more uniform than in the trucking case. An engine lathe operator may work for companies ordinarily classified in such groups as electrical machinery, textile machinery, machine tools, and shoe machinery. In determining the "comparable" wage rates, what grouping of firms should be selected?

There can be little doubt that wage rates do in fact vary by virtue of the influence of divergent product-market conditions. Maintenance workers, for instance, have rates that vary substantially through the range of industries even where job content is quite similar. The choice of groupings among firms presents the most difficult of problems.

The foregoing discussion of six groups of problems is adequate to divest the slogan or standard of "comparable wages" of any alluring simplicity. It is doubtful if there are any royal answers to these problems in principle or in measurement. The difficulties arising from the product market can be mitigated, however, if agreement is secured from the parties as to a list of comparable firms. This device has been frequently used by mediators.

II. PRODUCTIVITY

No argument is used with more conviction or sophistication than that wages should vary with changes in productivity. In the mid-Twenties the American Federation of Labor Convention adopted the policy that wage earners should share in rising productivity in the form of wage-rate increases. In recent days management, editorial writers,[8] economists, and some labor leaders have been preaching that increased productivity alone provides the basis for wage increases. These views have normally been associated with the conviction that wage rates have already outstripped productivity. As part of the mores or folklore of an industrial community there may be little objection to the slogan of productivity as a basis for increases in the general level of wage rates in the long run. As a guide or a rule of thumb in any particular negotiation, the principle has grave difficulties which may be briefly summarized.

(1) The rate of change in productivity in our economic system varies widely among the component segments. Within an industry the rate is normally quite different among firms. Even within a firm or plant the rate varies among departments, machines, and operations. The wage structure of a particular plant or department, if it were geared absolutely to changes in productivity, would soon become intolerable. Employees in continuous strip mills and on tin plate operations in the steel industry, for instance, would have had enormous wage increases in the past ten years in comparison with employees in other sectors of the industry. Under such circumstances the wage structure would bear very little relationship to skill, experience, or other factors typically taken into account in settling rate structures. Nor would

[8] See HENRY HAZLITT, ECONOMICS IN ONE LESSON (1946) c. XIX.

the wage structure bear any relationship to wages paid for comparable operations in other industries in steel centers. The exclusive adoption of the principle of adjusting wage structures according to changes in productivity would result within a very short time in an utterly chaotic wage structure within a single plant or industry.

In the same way, the adjustment of wage levels among industries exclusively by reference to this slogan would distort the wage structure of the country. Industries in which productivity increased rapidly would experience large wage increases, while in others in which productivity did not increase or actually declined (especially in extractive industries) wage rates would remain relatively unchanged. Either as a matter of allocation of resources or as a means to the maintenance of industrial peace, the absolute adoption of such a principle for determining the structure of wages among industries would be a catastrophe.

All this is not to say that changes in productivity do not have effects upon the structure of wages within plants or among industries.[9] It can be established, for instance, that wages in the past twenty-five years have increased more rapidly than the average in those industries in which employment and productivity have increased more rapidly than the average. Similarly, the wages have increased less rapidly than the average in those industries in which employment and productivity have either increased less rapidly than the average or actually declined. Despite all the publicity given to wage changes in the coal and railroad industries, wages in these relatively declining industries have increased less than in manufacturing firms. Between 1923 and July, 1946, average hourly earnings in manufacturing increased 109.4 per cent compared to 72.4 per cent for bituminous coal mining and 95.5 per cent for railroads. The simple fact appears to be that the wage structure over a period of time adjusts itself to changes in productivity in such fashion that wage rates increase most where productivity and employment have increased fastest, and wages increase less than the average where productivity and employment have increased less rapidly. However, a substantial part of the increase in productivity, where productivity is increasing fastest, is translated into price declines, increases in profits, and improvements in quality.

(2) The term "productivity" seems to have a fascination and rigor that impels many devotees to regard it as a formula for wage adjustments. The measurement of productivity presents, however, one of the most difficult problems of economic analysis, econometrics, and statistical measurement.[10] The customary measure of productivity is "output per man-hour," a measure secured by dividing a measure of product in physical units by a measure of man-hour inputs.[11]

In many industries the task of constructing an index of physical production is

[9] See Alvin H. Hansen, *Wages and Prices: The Basic Issue,* N. Y. Times Mag. Jan. 6, 1946, p. 9.

[10] For a more comprehensive survey of the statistical problems of measurement, see NAT. BUR. OF ECONOMIC RESEARCH, COST BEHAVIOR AND PRICE POLICY (1943) 142-169.

[11] For a current series, see *Productivity Changes Since 1939* (1946) 63 MO. LAB. REV. 893.

formidable, if not impossible. There may be many different products and their proportions in total output, or the "product-mix," may change frequently. While changes in quality and specifications will be particularly important in a job-order business, these factors are present to some extent in almost every case.[12]

(3) Between any two periods output per man-hour may vary as a result of a great many different factors, among which are the following: a change in the level of output, a change in the composition of production, changes in the average effectiveness of plant and equipment—as a result of scrapping obsolete facilities and bringing in new ones—increased effort and application on the part of the work-force, a change in the composition of the work-force, improvements in earlier stages of production as in the concerns which supply materials and parts, the substitution of other factors such as increases in wage rates, etc. These circumstances are hardly equally valid bases for an increase in wage rates in a particular plant or company.

In negotiations and public discussion little effort has been made to separate the effects of these factors influencing "productivity" in the sense of output per man-hour. The union may argue, on the basis of general knowledge of the industry, that productivity increases which have taken place provide a basis for wage increases. The Steel Workers Organizing Committee, as an illustration, argued in the *Little Steel* case in 1942 that "workers should receive an equitable share of the proceeds of increasing productive efficiency."[13] In addition to generally available output-per-man-hour data the union gave examples of man-hour savings through important technical changes. In a later case[14] the United Steelworkers of America supported its case by pointing in detail to new capacity, to the abandonment of obsolete facilities, to changes in the quality and composition of the labor force, and to the effects of further integration.

Evidence of changes in productivity is not readily transformed into cents-per-hour wage adjustments. In a number of industries, such as local transit and utilities, wage costs are to some extent a fixed cost, so that changes in output substantially influence output per man-hour. A higher wage rate in some industries may induce more careful inspection or use of higher-quality materials. Such a change would be reflected in output per man-hour. As has been indicated, these various types of factors affecting output per man-hour are not equally valid grounds for a wage rate adjustment. Not only is the measurement of productivity changes difficult, but their interpretation for relevant wage negotiations is even more ambiguous.

(4) Depending upon the precise meaning given to the productivity argument, the problem of the relation of wage changes to declines in productivity may have to be faced. In the normal case, changes in productivity may be regarded as typically

[12] For an instance of the measurement of production in the steel industries, see *Steel Industry, Prices, Profits and Costs* (Office of Price Administration, August, 1944) 37-41a. This study is cited in PHILIP MURRAY, STEELWORKERS NEED A $2.00-A-DAY WAGE INCREASE (1946) 60-62.

[13] Brief submitted by the S. W. O. C. to a Panel of the National War Labor Board (1942) 75.

[14] MURRAY, *op. cit. supra* note 12, at 44-68.

in one direction. There are instances, however, in which performance per average unit of labor input may decline as a result of the exhaustion of a resource, the use of a less skilled labor force on the average, or as the result of less intensive application. Under these circumstances is there an argument for a wage decrease?

III. COST-OF-LIVING INDEX

The change in the cost-of-living index[15] has been used during some periods as a standard to determine changes in wage rates. The relative emphasis placed on the cost of living by management and labor organizations depends on whether living costs are rising or falling. The attention given to this influence in wage discussions is greatest during periods of pronounced changes in living costs. In a number of collective bargaining situations sliding scales[16] have been established to adjust wage rates automatically to changes in the cost-of-living index. The more typical case involves using the cost-of-living argument as one factor among many in negotiations or in other forms of wage fixing.

As an absolute principle of wage determination the cost of living has severe limitations:

(1) The cost-of-living index typically contains important components, such as food and rent, whose price movements are not necessarily good barometers of the change in other wage-determining factors. For reasons peculiar to agriculture and housing, these prices may be out of line relative to the general level of prices. If this be the case, there would be serious question as to the propriety of altering the general level of wage rates, or any rate, by the application of the cost-of-living standard. There have been periods, such as the Twenties, in which industrial prosperity has been associated with agricultural depression. To contend that this fact should be binding in industrial wage-rate determination is dubious, just as a temporary rise in the cost-of-living index arising from a disappointing harvest would hardly be regarded as an appropriate basis for an upward revision in wage-rate levels.

The absolute application of the cost-of-living standard would force practically uniform wage-rate adjustments in all cases. (Admittedly, there are minor geographical variations in rates of change in the cost-of-living index.) But there may be occasion for important variations in the rates of change in wages among firms and industries.

(2) Labor organizations have frequently indicated that application of the cost-of-living principle over any considerable period would result in a stationary real standard of living for wage earners. The gains of productivity in our system have nor-

[15] In 1945 the Bureau of Labor Statistics changed the name of its index to "Consumers' Price Index for Moderate-Income Families in Large Cities." This index ". . . measures average changes in retail prices of selected goods, rents, and services, weighted by quantities bought by families of wage earners and moderate-income workers in large cities in 1934-36. The items priced for the index constituted about 70 per cent of the expenditures of city families whose income averaged $1,524 in 1934-46."

[16] See Z. CLARK DICKINSON, COLLECTIVE WAGE DETERMINATION (1941) 117-158, esp. 132-135.

mally been translated in part into increases in wages and salaries. The rigid application of the slogan of cost of living would result in a stationary real wage rate.

(3) Mention may be made briefly of the difficulties of measuring the change in the cost of living. These problems have recently received widespread attention.[17] It is not always clear whether the proponents of the principle in collective bargaining are interested in measuring the *price* of a constant bundle of goods and services, or whether they are attempting to measure the change in average expenditures. The latter concept includes the effect of changes in income levels, the effects of administering price structure so as to make available particular price lines of commodities, and "forced" substitutions of the type necessitated by wartime conditions.

(4) The application of any cost-of-living principle to wage determination must surmount the difficult problem of an appropriate base period. If wages are to be adjusted to the changes in the cost of living, there must be some starting point. The unions normally would select the period of the last wage change, in cases of increasing cost of living, while employers would emphasize the point that some more representative period of real earnings should be selected.[18]

(5) Automatic adjustment of the general level of wage rates to the cost-of-living index is not always appropriate policy. There may be times of high employment and output in which such a policy would result in cumulative wage and price increases. High employment is always loaded with inflationary dangers, and wage rate adjustments at such periods must be approached with care to avoid unstabilizing consequences.

IV. ABILITY TO PAY

The slogan of "ability to pay" has received particular attention in the course of postwar wage discussions in the public press and before fact-finding bodies. The argument is not new; probably it is as old as collective bargaining. In its simplest form the argument should be looked upon as a mere reflex of a wage demand. A union would not normally make a wage demand without at the same time stating that the demand could be met. There are, no doubt, some exceptions to this view, as in cases involving marginal concerns, but a union cannot make a demand with conviction unless it also implies that the company or industry can afford the wage increase. In much the same way, in the initial stages of bargaining the employer in rejecting the demand almost has to imply as a stratagem that it cannot be afforded. There are situations in which a company rejects a demand admitting that it can afford the requested adjustment, but these are not typical circumstances. On the most elemental plane, consequently, statements regarding ability to pay have been

[17] *Report of the President's Committee on the Cost of Living* (Office of Economic Stabilization, 1945). The various reports by labor and management representatives and by technical experts are appended.

[18] This issue was presented to the National War Labor Board in the *Little Steel Case*. The union sought to restore in 1942 the level of real wages as achieved on April 1, 1941, when a general wage increase of 10 cents an hour was placed in effect. See 1 WAR LAB. REP. 324, 334-337.

typically mere concomitants or necessary adjuncts to the demand or rejection of the demand.

Any discussion of ability to pay in more serious terms in wage negotiations necessarily raises a host of conceptual and statistical problems regarding the meaning of the phrase in any particular case. Among the more prominent of these problems are the following:

(1) What is the period during which one is concerned with ability to pay? A firm may be able to pay a specific increase for a short period, but not for a longer one. A large part of the difficulties in the postwar period arose from the fact that the unions demanded immediate wage adjustments, while the view of many companies in the reconversion industries was that wage adjustments should be postponed until output had been raised to more nearly normal conditions. Here was a conflict concerning in part the period of time to be considered in decisions concerning ability to pay.

(2) How shall one estimate the effect of wage-rate changes on costs? This question involves the problem of labor productivity, which is dependent not alone on the efforts of wage earners but also on the flow of materials and supplies and the effectiveness of management organization. In estimating the effect of wage-rate changes on costs a decision must also be made on the allowance, if any, to be made for the indirect effects of the wage adjustment on materials, prices, purchased parts, and equipment.[19]

(3) The volume of production will no doubt materially affect ability of an enterprise to pay wages. This difficulty concerns not merely the level of production but also the way in which production may be distributed among different types of goods (broadly, the product-mix), particularly among high- and low-profit items.

(4) The character of competition in the markets in which the products must be sold will substantially affect the ability to pay wage increases. These circumstances will influence the extent to which wage adjustments may be translated into price increases and the effect of such adjustments upon volume of output.

(5) The rate of return on investment to which the company is regarded as entitled will create a problem in determining the ability to pay wages. The familiar complications that have arisen in the regulation of public utilities indicate that this is not a problem to be treated lightly. Differing views on rates of return and valuation will significantly influence the content of the ability-to-pay slogan.

(6) The ability to pay wage increases before and after income taxes will vary substantially. Which measure is appropriate? The handling of other tax issues, such as the carry-back adjustments, may present serious problems in defining ability to pay.

Several recent attempts have been made to apply the ordinary multiple-correla-

[19] For an illustration, see the discussion in the steel case of 1943-44, *Report of the Steel Panel*, 19 WAR LAB. REP. 580 (1944). Also see *Report of the Emergency Board* in the 1938 Railroad Case.

tion technique to the problem of determining the capacity of enterprises to pay wage increases.[20] The analysis of General Motors Corporation, for instance, determined the level of profits by these variables: the level of output, average hourly earnings, cost of materials, prices of the finished products sold by the company, and a productivity time trend. By solving for the values of these relationships to profits on the basis of average relationships for the period 1929-41, it is possible to estimate the level of profits with specified values for output, wage levels, prices, material costs and productivity (a function of time). The effects of wage-rate changes on profits may be estimated under designated conditions regarding prices, material costs, and output.

This type of analysis no doubt warrants further examination. At least it should contribute to a better understanding of the quantitative relations among production, prices, and costs. The method cannot, however, provide any automatic formula for measuring ability to pay. Its proponents have never claimed that it does. The problems summarized and enumerated above are not suddenly dissolved. The level of output for the future contract period remains dubious. There may be grounds to question whether productivity will be above or below levels predicted from any time trend.[21] The statistical technique does not eliminate these problems; it may present them in different form.

The correlation technique may present its results in the better-known form of a break-even chart, showing the level of output or the percentage of capacity operations at which the enterprise "breaks even." This point will vary with changes in the prices of the products of the firm, the wage rates, and the productivity of the enterprise. This simple device may provide a helpful basis for discussion in collective bargaining over the economic position of the enterprise. What level of output should an enterprise regard as normal for wage-setting purposes? The analysis may help to suggest that temporarily high or low levels of output are not satisfactory standards by which to fix wage rates expected to be maintained over relatively long periods.

As an absolute principle of wage determination[22] the ability-to-pay principle is widely recognized as having severe limitations. In such an extreme form it has probably never been proposed. Contrary to popular impression, the United Automobile Workers did not base their wage demand in the General Motors case on ability to pay. The Union's main case was that a 30 per cent increase—without price increases—was necessary to "prevent disastrous retreat from the national objective of adequate purchasing power in the peacetime economy." The Union then attempted

[20] *Purchasing Power for Prosperity, The Case of the General Motors Workers for Maintaining Take-Home Pay* (Presented by International Union, UAW-CIO G. M. Department, Walter P. Reuther Director, (1945)) 55-74.

[21] See General Motors Reply to UAW-CIO, Brief Submitted in Support of Wage Demand for 52 Hours Pay for 40 Hours Work (1945) 14-19.

[22] See F. R. FAIRCHILD, PROFITS AND THE ABILITY TO PAY (1946).

to show that the General Motors Corporation could pay such an increase without a price increase.[23]

The general adoption of the principle of determining wage rates absolutely in accordance with ability to pay would result in very unequal wage levels among different firms. It would be incompatible with many union progams for equalization of wage rates among firms in the same industry or locality. The principle would appropriate to wage earners the incentives which the more profitable firms would have to expand production and employment.

Just as unions have stressed that employers have the ability to pay wage increases in good times, so managements have emphasized inability to pay on other occasions. For instance, one of the major headings in the brief of a company resisting a demand for a wage rate increase stated: "The financial condition of the company with revenues at practically the lowest point in twenty years makes it impossible to increase wages already adequate and at the same time maintain the present standard of transportation service, retain the present number of employees, and continue to render unified service."[24] The ability-to-pay argument has been employed frequently by companies attempting to make a case for a lower wage scale than other companies in an industry or locality. By virtue of location, machinery, size, or temporary financial embarrassment, an enterprise may seek to secure special wage treatment on grounds of inability to pay.

There will be wide differences of judgment in any particular situation concerning the net effect of the factors defining and measuring ability to pay wages, differences not only between parties but also within any group of relatively disinterested observers.

V. FUNDAMENTAL PROBLEMS

The analysis of the slogans and principles of wage determination summarized in the four preceding sections indicates that there are fundamental limitations to the application of these principles to particular situations. These limitations must be faced with candor.

First, the range of possible wage rates which would follow from the various possible applications of each of the principles would generally be wider than normal variance between the parties in collective bargaining. The alternative meanings and measurements of each one of these standards are so diverse that the principle frequently can provide little help as an authoritative determination of wages. The same point may be made in alternative language: the differences between the parties are simply translated into alternative meanings and measurements of a particular wage slogan or standard. The range of disputed application of any of these principles is

[23] *Purchasing Power for Prosperity*, cited *supra* note 20, at 1, 21.

[24] Brief on Behalf of Pittsburgh R. Co., Arbitration between Pittsburgh R. Co. and Div. No. 85, Amalgamated Ass'n. of Street and Electric R. Employees of America (Hearings held from July 16 to August 18, 1934).

likely to be much wider than the normal range of disagreement between the parties.

Second, since all wage determination must be considered with reference to a prospective period, conflicting expections as to the future are certain to result in divergent applications of any set of wage principles. The point is not merely that the future in general is uncertain but that uncertainty exists in respect to the magnitude of specific factors—such as output, price, and productivity—vital to present wage determination.

Third, the application of wage slogans or principles is complicated by the fact that the parties frequently have conflicting and divergent basic objectives. These are particularly contentious when the "time horizons" of the parties are markedly different. The company may be interested in remaining in business over the long run while a union may be interested, by virtue of the political problems of leadership, in its position during the next year. Or the union may be interested in maximizing the position of union members during their lifetime without regard to new and younger employees. A further illustration of this basic conflict exists in a situation in which the management of a particular company may be interested in the continuation of its own position over a period of time, while the union may be concerned with the industry more broadly. Such conflicts in basic objectives are certain to yield divergent wage levels.

Fourth, even if any one of these standards could be applied in an unambiguous way, the problem would remain of choosing among these alternative standards or weighting the results they yield. No two of the principles would result in the identical wage-rate change in a specific situation.

These difficulties suggest a pessimistic conclusion as to the contribution which economics can make to the solution of wage disputes. There is no royal road to the application of economics to wage determination. There is no simple formula which may be simply applied to particular cases. The rigor of the classroom diagram blurs in the face of the complexities of collective bargaining when the rigid assumptions of the formal analysis have been removed. In fact there are no "economic" problems in the real world. There may be economic aspects of problems, but the real problems which require decision must be faced as entities. The more frankly and explicitly technical economists admit this fact, the greater the assistance they may eventually give in the solution of practical problems of wage determination in particular cases.

VI. Criteria for the General Level of Wage Rates

The slogans and clichés used in discussions of the general level of wage rates would require another major paper. Only some of the more prominent issues can be indicated. There is fairly general agreement among economists that the average increase in productivity constitutes the appropriate norm for the long-term movement of the general level of wage rates.[25] As average productivity increases, the

[25] Alvin H. Hansen, Economic Policy and Full Employment (1947), 152-160.

level of money wage rates and salaries should rise. The price level as a whole should remain relatively stable. These norms would roughly continue the actual relationships of the past century.

In order for the price level to remain constant, however, industries with greater than the average increases in productivity must decrease prices. In a day of extensively administered prices, these decreases may not be forthcoming. The pricing mechanism may have lost the flexibility requisite to this standard of wage setting. Moreover, the internal requirements of the labor movement may necessitate larger wage-rate increases than are possible under the productivity standard. Intense leadership rivalries may produce greater wage-rate increases, with a consequent rise in the price level.[26]

As a standard for setting the general level of wage rates, no slogan has received greater attention than purchasing power. While the cliché is used in particular cases, a separate section has not been devoted to it in the preceding discussion since no single wage bargain is so extensive as to permit a particular wage change to affect directly and appreciably the purchasing power expended on the products of the firms in negotiation. The standard of purchasing power must refer to the general level of wage rates.

The crudest form of the argument identifies wage-rate and purchasing-power changes. There is no need here to expand on the fact that the relation between changes in wage rates and the aggregate expenditures for consumption and investment in any period is not simple nor direct.

A more sophisticated form of the purchasing-power standard relates to the balance between wage rates and prices. The Nathan Report is cast in these terms.[27] The level of wage rates is regarded as too low at the existing level of prices to sustain high levels of employment. Decreases in the price level are regarded as unlikely. ". . . Businessmen show no signs of exercising such self-restraint in their natural search for profits as would bring about a decline in prices except in the face of a sharp reduction in demand."[28] The Nathan Report concludes that a substantial increase in the level of wage rates without corresponding price increases is required to sustain purchasing power and high-level employment.

The Nathan Report raises the fundamental question of the standards to be applied in appraising whether the levels of wages and prices are in balance.[29] If a lack of balance is determined, the issue must be faced whether wages or prices should be corrected. These questions cannot be answered by rote. Judgment as to appropriate policy must be based not only on the level of profits but also on the structure of wage rates and prices. (The Nathan Report fails to emphasize the necessity for corrections in the structure of prices. Prices for textiles and foods must be reduced.

[26] See John T. Dunlop, *American Wage Determination: The Trend and Its Significance,* a paper read before the Chamber of Commerce Institute on Wage Determination, Washington, D. C., January 11, 1947.

[27] ROBERT R. NATHAN AND OSCAR GOSS, A NATIONAL WAGE POLICY FOR 1947 (1946).

[28] *Id.* at 3.

[29] The analysis of the ability-to-pay standard in Section IV, above, provides a counterpart to this question in the case of a single negotiation.

They are out of line. A general wage-rate increase cannot improve the internal balance of the price structure.) Judgment as to appropriate wage-price policy must also be influenced by the level of interest rates.

An annual appraisal of the economic outlook, such as is provided in the Report of the Council of Economic Advisors, can promote a widespread understanding of the problems to be confronted in particular wage negotiations. A greater economic literacy among the rank and file of union members and business executives can improve the atmosphere in which specific wage conferences take place.

VII. THE CONTRIBUTION OF ECONOMIC ANALYSIS

The restraint of the previous sections follows not so much from modesty as from candor. It must not be concluded, however, that the economist has nothing relevant to say in the process of wage determination, whether it be collective bargaining, arbitration, or governmental wage-fixing. Economic analysis can make at least these distinctive contributions to the settlement of wage disputes:

(1) The parties or other wage fixers need to be reminded of the longer-run consequences of any decision. While no simple formula or standard may be available to fix a wage, the possible effects of any decision on the employer and the union involved need to be explored. Regardless of the standards used in setting wage rates or the objectives of the parties, economic analysis calls attention to the channels of effect of any wage decision on output, prices, and employment. It can serve as the conscience of the parties as to many of the less immediate effects of a wage rate decision.

(2) Economic analysis points to the impacts of wage rates in sectors of the economy outside the immediate decision. It is particularly concerned with the effects of wage changes on the total national income and the aggregate level of output and employment. "What is true of a firm or of a particular industry or of a set of industries need not be true of the economy as a whole. To draw attention continually to such relationships between the parts and the whole is probably the most distinctive function of the economist."[80]

The processes of wage-dispute settlement need to develop, as they are developing, specialized personnel within unions, employers' organizations, and public bodies who are skilled in the exercise of judgment in the intricate and complex business of wage determination. A person so skilled may profitably utilize the technical services provided by statisticians, lawyers, economists, actuaries, publicists, industrial engineers, and others; but the primary need is for the mature practitioner to exercise judgment.

Economic analysis purports to deal with one aspect of human behavior. Wage-setting must involve the totality of behavior. Any practitioner must develop the art of applying the tools of the technician in the light of all of the complexities, and frequently the perversities, of human behavior.

[80] Lerner, *The Relation of Wage Policies and Price Policies* (1939) XXIX AM. ECON. REV., PROCEEDINGS 158.

MINIMIZING DISPUTES IN LABOR CONTRACT NEGOTIATIONS

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The public has a large stake in labor relations. From V-J Day to June, 1946, the direct wage loss alone resulting from strikes within the United States amounted to $1,050,000,000.[1] The economic repercussions from such a wage loss, felt as they are throughout our entire society, bring us directly to grips with the question: How can disputes arising out of the collective-bargaining process be minimized? Out of this process have come the disputes which have caused the strikes which, in turn, have torn our economy apart. Therefore, if we are to minimize the public injury which stems from strikes, we must analyze the collective-bargaining process to determine whether changes can be made in this process which will diminish disputes.

But the mere diminishing of disputes is not enough. The public may be injured as seriously by the agreements reached between the parties at the collective-bargaining table as it is by the failure of the parties to agree. The injury caused by a wrong agreement is not as direct as that of the strike which results from a failure to agree, but in the long run it may be more serious. As Professor Sumner Slichter of Harvard University has pointed out, the establishment of collective bargaining during the last decade means that the whole country has entrusted its future standard of living to the bargaining representatives of both sides.

Analysis of the current understanding of collective bargaining reveals that the process is completely unprincipled and has as its cornerstone the concept of "compromise." The statement that it is an unprincipled process means that each party approaches the conference table either with fear that the other party will attempt to take unfair advantage, or determined to assert unreasonable demands backed up by economic strength. The presence of latent fear on one side and unreasonable demands on the other, depending upon which side is in a dominant bargaining position, makes orderly bargaining difficult, if not impossible. Hence, the job to be done is to determine whether there are any basic principles which can be used as guideposts, so as to remove this fear and control unreasonableness.

If collective bargaining is to be controlled by principles, they must be principles

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[1] The total wages lost cannot be computed, but the coal strike of 400,000 threw about 1,000,000 persons out of work. During the same period, steel output was reduced 11,400,000 tons, coal production 113,000,000 tons, lumber 3,150,000,000 board feet, automobiles and trucks 2,900,000, refrigerators 1,008,000, washing machines 415,000. U. S. News, June 14, 1946, pp. 13-14.

which both parties will in time accept. Or, if the two parties will not accept them voluntarily, they must be principles which the public, after sufficient education, will force the parties to accept. Such acceptance may be forced either by the weight of public opinion or through positive legislation.

If they are to command public support and ultimate acceptance by both sides, the principles must be based upon the public interest, rather than upon the special interests of either of the bargaining representatives. Furthermore, the principles must produce concrete answers to the typical problems that arise in a labor contract negotiation.

This article, therefore, must consider the current concept of collective bargaining, analyze the considerations of public interest involved, determine whether these considerations will support a series of simple and acceptable principles, and then apply these principles to the typical problems which arise in bargaining.

I.

THE CURRENT CONCEPT OF COLLECTIVE BARGAINING: "GIVE AND TAKE AND COMPROMISE"

Managements have been told over and over again that the source of their difficulty with labor unions is that their representatives do not approach the conference table with a spirit of "give and take and compromise." They are blamed because they do not engage in what is called "real collective bargaining." When asked what that means, the advisors to the industrial manager tell him it means a willingness to compromise. When a dispute arises over a contract term and a representative of the United States Conciliation Service intervenes, he very naturally first finds the positions of the respective parties and then hunts for a middle ground where the dispute can be "compromised."[2]

The War Labor Board was established on a tripartite basis for the same reason: to find solutions to problems by compromise. It was believed that the public members could find the middle ground between the positions of industry and labor after hearing the positions of both sides discussed by their respective representatives sitting as members of the board. The labor representatives on the board regarded themselves as partisan representatives of labor.[3] Industry members were likewise partisan representatives. Under such conditions, the public members of the board naturally tended to solve problems by compromise between the two partisan posi-

[2] John R. Steelman, then Director of the U. S. Conciliation Service, said to the American Management Association on February 14, 1940: "However, no matter what the situation, the Conciliator's efforts are usually directed to reducing all controversial questions to rock bottom. Sometimes this procedure results in the elimination of all points in dispute. At other times there may remain a point, or several points, on which both parties refuse to yield. *In such cases, the Conciliator may suggest modifications and compromises.*" AMERICAN MANAGEMENT ASS'N, PERSONNEL SERIES NO. 44, CONCILIATION AND COOPERATION IN COLLECTIVE BARGAINING 18, 23 (1940). (Italics added.)

[3] R. J. Thomas, labor member of the National Board, said on July 28, 1944, that he did not consider his War Labor Board membership a "federal service" or "as working for the Government," but "solely to represent labor."

tions. Actually this approach satisfied no one and only accentuated the differences between the parties.[4]

There is no reason to believe that a compromise of two partisan positions necessarily produces a proper answer.[5] The fallacy of this method can be simply demonstrated: The employer, prior to union organization, has all of the rights to manage his plant, subject only to legal restrictions. After the plant has been organized, the union presents demands upon the employer. The employer has no demands to present to the union other than the request that the union refrain from calling a strike for a given period of time. Thus the employer, throughout the development of the union movement, has been the "giving" party and the union traditionally the "asking" party. Therefore, the compromise method of settling differences amounts to the whittling of concessions from the employer. It is merely a process of raising the demand each year and obtaining part of the demand by "compromise."[6]

This process of compromise, continued year after year, means that the employer must give more and more to the union without any apparent stopping place in sight. The fallacy of "compromise" in collective bargaining becomes clear when one asks, "When does it stop?" At what point can the employer, with assurance, say "No" to a union demand without fear that, when he goes before the conciliator or other governmental agent, a solution will not be suggested to him which will be merely another "compromise"?[7]

It may be said that the compromise between the union and management positions may go the other way when we have a business depression. It is probably true that when business conditions are poor wage rates can be forced down, because the employer's position is then stronger. However, reliance upon the fact that compromise may favor management in a future depression is tantamount to believing that the proper collective-bargaining balance between unions and managements can

[4] William M. Leiserson, who was a member of the National Labor Relations Board, detected this inherent fallacy in tripartite organizations when he said on February 18, 1942: "A tripartite body with . . . public members . . . employer members and . . . labor members . . . tended to accentuate differences rather than to resolve them. . . ." See N. Y. Times, Feb. 19, 1942, p. 12, col. 2.

[5] The concept of compromise as the means to a correct answer has even invaded the decisions of courts. In NLRB v. George P. Pilling & Son Co., 119 FED. 2d 32, 37 (C.C.A. 3d, 1941) the court said: "*But agreement by way of compromise* cannot be expected unless the one rejecting a claim or demand is willing to make a counter-suggestion or proposal. And where that is expressly invited but is refused, in such circumstances the refusal may go to support a want of good faith and, hence, a refusal to bargain." (Italics added.)

[6] This is shown clearly by the Steelworkers' "dollar-a-day" demand (12½ cents an hour), which produced a compromise at 5½ cents an hour in 1942. Little Steel Companies, 1 WAR LAB. REP. 325, 328 (1942). This was followed by a 25-cent per hour demand in 1945, which produced a compromise of 18½ cents in 1946. See General Order No. 1, Office of Stabilization Administrator, §5, 1 LAB. ARB. REP. clviii, clix (1946).

[7] Philip Murray's concept of collective bargaining is somewhat different. He said in an analysis accompanying a letter to President Truman urging the veto of the Case Bill: "The simple fact is that the right of individual workers to quit their jobs has meaning only when they may quit in concert, so that in their quitting or in their threat to quit they have real bargaining strength. *That is what is meant by collective bargaining.*" N. Y. Times, June 3, 1946, p. 10, cols. 2, 3.

be maintained only over a long period of time and only through the fluctuations of the business cycle. If we must rely upon this cycle to weaken the bargaining strength of one side or the other and to prevent excesses by either, we do not have a theory of collective bargaining which is sound.

Unless the labor unions' whittling-away on management by collective bargaining through compromise can be stopped, or the limits on that process made clear, one cannot expect management fully to accept unionism. Only if the limits are made clear will both sides settle down to really co-operative efforts. Thus, the sooner the concept of "compromise" is forgotten as the basic approach to the settlement of disputes at the conference table, the sooner real industrial peace will be obtained.[8]

II.

THE PRINCIPLES OF COLLECTIVE BARGAINING MUST BE BASED ON THE PUBLIC INTEREST

There are risks in the union movement to the public generally, as well as to an individual company's management or ownership. Interestingly enough, the major hazards to management and ownership and to the public generally are precisely the same. This is extremely important, because it enables management's representatives at the conference table to adopt a position based upon the public interest which will also effectively protect the interests of the group which they directly represent. Likewise, there are risks in the union movement to employees and, for that matter, to unions themselves. These risks are often long-term risks which are lost sight of because of illusory short-term gains. Like the hazards to the public, those to the employees are much the same as the hazards to management and ownership. Let us briefly consider the reasoning which demonstrates that management's interests, employees' *long-term* interests, and the interests of the public in collective bargaining are identical.

A. Industrial Efficiency Means a High Standard of Living

The public is interested in industrial efficiency just as much as, if not more than, the management and the owners of an individual company. The London *Economist* in August, 1944,[9] called upon the British Government to organize a campaign to inform Great Britain of the need to raise British production to the same level per worker as in America so as to give Great Britain a standard of living equal to that of this country. The *Economist* maintained that the alternative would be for the British standard of living to drop to the level of that of Germany and other Euro-

[8] "The difficulties in solving the problems created by the shift of power from business to labor are enormous. The most formidable obstacles to these changes arise from the necessity of recognizing new facts and problems and dropping many ancient preconceptions and traditional points of view. So rapid and recent has been the shift of power that many employers and workers do not yet realize what has happened. They still regard trade unions as underdogs." Slichter, *Trade Unions in a Free Society*, Daily LAB. Rep. (BNA): D-1 (October 8, 1946).

[9] *A Policy for Wealth*, 147 Economist 236, 237 (1944).

pean countries. This English newspaper stated that the average American worker produces in one hour "one and one-half to two and one-half times as much wealth as the British worker," and consequently enjoys more leisure and better conditions.

This statement expresses the simple rule that a nation's standard of living depends on its productivity per man-hour.[10] In other words, high productivity or high efficiency means a high standard of living, and a high standard of living is in the public interest. Because this is true, union representatives should not make demands at the conference table which interfere with the efficiency of the plant, for in doing so they endanger the standard of living of their members. Management should be duty-bound to resist such demands if they are made, for high efficiency means profitability, and such a position on the part of management is consistent with the public interest. The government in its participation, from conciliation throughout whatever system is devised, should adopt the same policy if it is to perform its duty. Its duty is obviously to protect the public interest, which means to preserve a high standard of living, which in turn requires high efficiency and high productivity.

The first principle, therefore, is: The negotiators of a labor contract must not make any agreement which injures or limits industrial efficiency.

B. Incentives are Necessary for the Creation of Jobs

Workers unemployed become a public charge. The public, therefore, is interested in the maintenance of job opportunities for all who are able and willing to work. It follows that it is to the public interest to preserve the incentives which are necessary for the creation of jobs. This problem has two aspects. First, penalties placed upon management which are deterrents to healthy expansion reduce the number of jobs industry will create; and second, reduction of the profit return below the level that will properly reward the risk-taking investor will reduce the flow into industry of the new money which stimulates new growth and, hence, creates new jobs.

The nation's industrial plants are now producing goods to satisfy consumer demand built up during the period when our economy was producing war goods. When this initial job is finished, there will come a rapid drop in demand for the goods now being produced. The only way to provide jobs for the persons who will be displaced as demand diminishes is to start producing new products in the place of old. Neither unions nor the government can make real jobs. They can only assist. As Alfred P. Sloan, Jr., of General Motors Corporation, has aptly said: "Political promises do not create jobs. . . . Jobs flow from a combination of capital, management, and opportunity, and from nothing else. . . . Without these ingredients there can be no jobs."[11]

[10] Some American labor leaders understand this fact. Walter Cenerazzo, President of the American Watch Workers' Union, said: "Now the unions have got to help capital and management carry the load of more goods, more services and more welfare for the American people." Reader's Digest, Dec. 1946, p. 27.

[11] *The Importance of Jobs,* 11 VITAL SPEECHES 115 (1944). Some government spokesmen have had a contrary view: "The other thing that I think the Government ought to guarantee is some kind of job to every person who can work. If a person has done all he can to find a job and still can't find one, the Government ought to offer him a job." Goldenweiser, *Postwar Problems and Policies,* 31 FED. RES. BULL. 112, 115 (1945).

Technological improvements resulting from the war will cause some pre-war businesses to go bankrupt and new businesses to be born. In fact, new business activity must constantly be born if we are to prevent a serious slowdown of the industrial pace and a reduction in the total number of jobs. Thus, changes in the concentration of capital and labor from old to new fields necessarily take place. These shifts must be made rapidly. Only if the growing fields of industrial activity are invigorated by new investment will total employment remain constant or expand.

The shifts and changes which must take place will cause some people temporarily to lose their jobs. Since no one can be sure who these people will be nor how long they will be out of a job, thousands of people today are worried about their economic future. This widespread consciousness of the uncertainties of the future, stimulated by labor unions,[12] has aroused a passion for any plan or proposal for economic security.[13]

Since industrial change involves some elements of insecurity, proposals for economic security are often *plans to prevent change*. Yet change is essential to full employment and national economic health. Therefore any effort, whether by unions through the collective-bargaining process or by government through regulatory restrictions, to impose a stability upon industry which runs counter to the adjustments demanded by progress will lead to a rigid economy. The ultimate disruption of such an economy when the effort finally fails—as fail it must—will destroy the very security which was the objective of the restrictions placed on industry.

Therefore, we find at the conference table a struggle between two points of view: that of the union negotiators, who often believe that the highest standard of living and security for the largest number come from an industry which is regulated so as to prevent the changes that cause insecurity, and that of the industrial manager, who believes that the highest standard of living and security for the largest number come from complete freedom of action by management.[14]

[12] George F. Addes, secretary-treasurer of UAW-CIO, said: "From an economic standpoint, the average man feels even less secure than he did a year ago. Developments have taken place which shake to the very core the confidence of the common man in the ability and even the desire of many of our economic and political leaders to plan an economy in which there would be some semblance of security for the wage earner." United Automobile Worker, Dec., 1946, p. 5, col. 3.

[13] "The Government should guarantee to every American a minimum standard . . . below which no person in this country needs to fall under any circumstances. . . . What we need is better organization among the lower income groups. This should be a broad objective of public policy." E. Z. Goldenweiser, Economic Advisor to the Federal Reserve Board, *loc. cit. supra*, n. 11, at 115.

[14] This struggle has been called by Mr. Harold Laski, chairman of the British Labor Party, *liberalism vs. socialism*. "We have come to the boundaries of the final dividing line between *liberalism* and *socialism*. There is no middle way. Free enterprise and the market economy mean war; socialism and planned economy mean peace. All attempts to find a compromise are a Satanic illusion. We must plan our civilization or we must perish." N. Y. Times, Dec. 4, 1945, p. 1, col. 6; p. 5, col. 3.

As Mr. Laski uses the word "liberalism," it is synonymous with a belief in free enterprise and a free market.

The word "liberalism" is a popular symbol. It has always meant change, but, in addition, most liberal movements have been attacks against governmental direction and control. One of the early liberal movements was the departure from autocratic government exemplified in the Magna Charta. The limitation upon central governmental control incorporated into the American Constitution was another result of a liberal movement. If socialism means governmental direction of the economy, it must properly be opposed by "liberals."

The proper approach falls between these points of view if deterrents to change are not to be imposed on industry. Put new development and efficiency of industry in the forefront of our thinking and acting, and then provide supplementary but adequate measures to protect those individuals who are temporarily displaced in the process of industrial change. Such measures must not restrict change, however, or long-term security will be lost.

In addition to opposing unreasonable restrictions on change, or the "planned economy," thinking people are becoming conscious of the importance of retaining a strong profit incentive in industry. The proposals to abolish the corporate income tax because it has a deadening effect upon American industry by removing a substantial part of the profit incentive are illustrative of this trend. Since economic development is stimulated by the possibility of profits, the profit incentive must not be destroyed. If it is destroyed, the necessary expansion of industry will lag and will not offset the inevitable postwar contractions, and the industrial machine will slow down.

If profits in any given industry appear large at any given time, they serve a real social purpose. High profits mean unsatisfied demand for the industry's products. They lure into that industry new and expanded enterprise designed to satisfy that demand, thereby creating more jobs. If high profits in such an industry are siphoned off too quickly through wage levels or tax rates out of proportion to those of older, lower-profit industries, they will not accomplish this important function. No social injustice occurs during this development period, because the risk-taker who ventures into new fields deserves a high profit until others entering that field catch up and create a competitive situation, with the result that profits drop to a more normal level.[15]

For the reasons outlined here, the protection of the profit incentive has been recognized as essential to the maintenance of a healthy industry and the creation of unstinted job opportunities. Public works programs supported by taxes are no adequate substitute for new industrial growth. In the last analysis, the wage earner must rely upon a healthy industry for security.[16]

Thus, the second principle is: Collective bargaining must not be permitted to impose restrictions on industrial change nor to destroy the profit incentive.

[15] FLOYD A. HARPER, THE CRISIS OF THE FREE MARKET (National Industrial Conference Board, 1946) 19, concerning the assumption of government control of industry which would include the assumption of the risk-bearing function: "If Uncle Samuel or some other benevolent gentlemen assumes the risk, the equivalent of profit is still there and has merely been moved so that all of us or some one else bears it; its existence and cost are not changed, in fact, its cost will increase because we become careless about success when failure belongs to some else."

[16] The UAW-CIO International Union Policy (April, 1946) states: "We should not concern ourselves with whether the corporations are protected in maintaining their high profit levels. The corporations are adequately capable of protecting their own profit levels without any help from labor spokesmen." Daily Lab. Rep. (BNA) E-1 (April 19, 1946).

Walter Cenarazzo, President of the American Watch Workers Union, understands the value of profits. "Only out of profits can our employers give us better tools for better production, out of which we can get our cut in bigger wages. We have got to help our employers make good profits," Readers Digest, Dec. 1946, pp. 27, 28.

C. Wages and Purchasing Power

The public is interested in the preservation of purchasing power, for purchasing power is essential to continued production, which, in turn, is essential to continued and increasing employment. It was belief in this theory that led to the "pump-priming" public works programs of the New Deal, resorted to in an effort to pull the country out of the last depression.[17]

Collective bargaining will perform a valuable function if it effectively prevents a sudden drying-up of purchasing power. Recent history has shown, however, that while unions through collective bargaining have been able to obtain large wage increases, such increases have been followed almost immediately by price increases. This has caused many to question the advantage of the wage increases to the union members and to emphasize the injury which they have caused to another segment of the public—the individuals living on a fixed dollar income.

Mass purchasing power can better be maintained by full employment even at constant wage levels than through wage increases with reduced total employment. If collective bargaining forces wage rates up too rapidly for certain special groups, the total number of jobs may be lessened because the remaining persons will be unable to buy the goods produced at the higher prices which will be charged; thus the total purchasing power may be decreased. This will result in non-consumption of the goods produced and a serious threat to our economy.[18]

While the purchasing-power theory of wage increases may have some validity in a depression era if properly controlled, it is completely invalid as an argument for unlimited wage increases during a period of inflation. Inflation, by definition, is a condition in which there exists more purchasing power than goods to purchase. In such a period the emphasis must be on increased production, not on increased purchasing power. Unrestrained collective bargaining in an inflationary period when labor is in short supply thus carries the threat of unbalancing our economy by improperly increasing wages.[19] Thus the third principle is: Collective bargain-

[17] The purchasing-power theory is the unions' theory. Philip Murray said: "The first decision that must be made is that America shall be a country of high wage standards, where the masses of the people have sufficient purchasing power to create a great domestic market for ever-expanding production." N. Y. Times, January 1, 1946, p. 20, col. 5.

Walter Reuther said: "America's postwar problem is not production, it is the maintenance of purchasing power so that the American people can buy back the abundance they can produce." N. Y. Times, November 25, 1945, p. 36, col. 3.

[18] The purchasing-power theory as a union argument is valid only if one assumes that the propensity to consume is greater among wage-earners than among other economic groups.

[19] The Nathan Report, which is the statistical springboard for the 1947 wage drive of the CIO, argues that profit return is too high. Wage increases, Nathan says, are needed to create buying power. The most obvious fallacy in this report is that the average profit level assumed by Nathan to be correct was the 1936-39 average profits of all corporations. This period included abnormally depressed years. Furthermore, the 1946 profit levels, especially in retail sales, are undoubtedly inflated because of scarcities of goods. He mentions, but fails to apply, the fact that profit levels vary between industries and individual companies, which makes a report based on averages inapplicable to individual companies. The conclusion that a 25% wage increase can be granted throughout industry without price increases would be laughable in view of the price increases that immediately followed wage increases in 1946 if it were not for the fact that millions of people will believe the conclusion.

ing should not reduce the nation's purchasing power by raising prices or reducing wages too rapidly.

III.

THE REAL PARTIES TO A LABOR CONTRACT ARE NOT THE NEGOTIATORS

The real parties interested in a labor contract are three: the employees or wage-earners; the owners or investors; and the consumers or the general public. The agreements that are made and those that are not made at the conference table affect all of these groups.

The negotiators are the industrial managers and the labor union representatives. They act merely in representative capacities. It is important to discover what the natural motivations of these two negotiating representatives are in order to determine whether or not either one or both of them are naturally motivated to obtain collective contracts consistent with the public interest.

A. The Union Negotiators

Modern unionism is big business: over fifteen million employees are members, out of a potential of about thirty million wage-earners eligible for membership. Forty-five per cent of this membership is under closed- or union-shop contracts (compulsory unionism), and 77 per cent under some form of union security.[20] The income of unions is measured in millions of dollars per month.[21] At $1.50 per member per month, the income from General Motors employees or Carnegie-Illinois Steel Corporation employees is a staggering figure. The salaries of the top union officers are high: Petrillo, $48,000; Lewis, $25,000; Tobin, $30,000.[22]

Unions have become big within the last ten years. Much of this growth started with the spontaneous organization of employees for bargaining purposes, but now unions continue to grow through organizational drives. Examples are the organizational drives in the South by both CIO and AFL. In one plant of 2,000, it cost $25.83 per worker to organize the employees into the UAW-CIO.

In order to organize people, union organizers naturally make promises of higher wages and better conditions. Also, union organizers must demonstrate that employees need a union; hence, they create in the minds of employees a fear of economic insecurity and a fear of managers, who are described as hostile capitalists bent on the destruction of working people. It is hard to sell unionism by telling workers that the management is fair.

These organizational promises and the general attack upon management, which are deemed necesary organizational steps, have produced a groundswell of rank and file pressure for more wages and more security. This was frankly stated by

[20] In 1945, twenty-nine million persons were eligible for union agreement coverage, and 48% were covered by contracts. United States Bureau of Labor Statistics, *The Extent of Collective Bargaining and Union Recognition in 1945*, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS (BNA) p. 15:1.

[21] Estimated at $26,950,000 per month from 13,000,000 dues-paying members by Victor Riesel, Labor Editor, New York Post. *Labor Is Big Business*, 61 AM. MERCURY 728 (1945).

[22] Tobin also receives "business and pleasure traveling expenses for self and wife." *Ibid.*

Joseph Padway, General Counsel of the AFL, when he said: "That is trade unionism. We want more and more. Continually more. More wages; more leisure; and more of the goods of life that we make. . . ."

Add to this groundswell of demand the fact that unions are essentially great political organizations. The leaders are elected by the rank and file.[23] Therefore, one leader must outdo the next in his demands in order to insure continued loyalty of his constituents.[24] The necessity to maintain position in unions by producing more means that by propaganda employees must be stimulated to want more to such an extent that they will strike. The willingness of the rank and file to strike is the surest way for the leaders to get more. Hence there develops a vicious spiral of increases in wages, the creation of demand for more increases, further increases, further demands, etc.

Finally, there is the minority of union officials who subscribe to the communistic philosophy either officially or unofficially.[25] Stated simply, this is the philosophy that capital and labor are unalterably opposed, and that if conflict can be stimulated the capitalistic system will eventually destroy itself, with the result that the people will be able to take over industry and run it on a planned-economy basis with political bosses (former union leaders) in control, rather than managers. The prevalence of this philosophy merely adds fuel to the union leader's incentive to generate demands in order to continue to grow.

The motivations of the union negotiators thus appear to be many and complex. These motivations must be understood by the management negotiators if an adequate job is to be done at the conference table. One thing is clear: the natural motivations all lead in one direction. That is, "more, we need more." It must be concluded that union negotiators have no natural incentives to strike a balance between the interests of the three major groups involved.

B. The Management Negotiators

For the purposes of this analysis, management, as is true in most cases, is assumed to be a professional management, rather than a management composed of owners.

Professional management desires to operate an efficient plant, sell a large volume

[23] Daniel T. Pierce, assistant to the president, Sinclair Oil Company, said: "One of the first things we learned was that union officials, national as well as local, were merely title holders. They were unable to lead, even when they desired to do so. Thy were puppets of the rank and file. Over and over again we were told, in confidence of course, by the unions officials that they knew demands or grievances were unreasonable but that they, the officials, had to present them because their constituents so insisted." *How the Union Disillusioned Us,* Factory Man. and Maint., Jan. 1946, p. 94, col. 1.

[24] Two transportation union presidents, for example, stopped the nation's railroads in 1946 because an emergency board, appointed by the President, awarded them no more than a board of arbitration gave eighteen other railroad unions. Four hundred thousand coal miners were called out on strike in 1946 after their president rejected a wage increase of 18½ cents an hour, and millions of non-miners were thrown out of work in order to win gains beyond those achieved by other unions.

[25] *The Communist Fifth Column,* Chicago Journal of Commerce, June 24-July 11, 1946; COMMUNIST INFILTRATION IN THE UNITED STATES (CHAMBER OF COMMERCE OF THE UNITED STATES, 1946); J. Edgar Hoover, *Red Fascism in the United States,* American Mag., Feb., 1947, p. 24.

of products, and make a good showing on the balance sheet for the owners. To do this, it must:

1. Pay a wage high enough to obtain the proper skills, yet not so high that costs become noncompetitive and the products produced cannot be sold. A professional management is under an incentive to raise wages as wage levels in the area go up;[26]

2. Fix a price for the product which will be low enough to obtain a large volume of sales and low unit costs,[27] but high enough to pay wage costs and insure an adequate profit;

3. Pay a high enough return to the investor to insure future investment when it is needed and to insure management's own job security, but not so high as to prevent allocation of capital for improvements in machinery, plant expansion, etc.

Professional managements thus appear to be under natural incentives to balance the shares received by each of the three interested groups—the workers, the consumers, and the investors. The concept of the management negotiators as "balancers" is of prime importance in the collective-bargaining process.[28] Since managements are under natural incentives to strike a balance, they, in fact, become the best representatives the public has at the conference table.

IV.

THE LABOR CONTRACT—WHAT SHOULD IT BE?

Before we deal in detail with some of the major problems that arise in the negotiation of a labor contract, one further preliminary matter should be considered. What is the purpose of a labor contract, considered as a total document?

A labor contract is a statement of policy which is established through negotiations and which is to remain in effect for a fixed period of time.

If it is a policy to control the relationship between the parties, it must clearly set forth the rights and obligations of the parties so that they can properly perform their respective functions. Therefore, it is necessary to examine the functions of the parties to a collective contract.

A. The Management Function

Management's prime function is to manage—that is, to plan the work and to direct the working forces. Management is a group of individuals trained, at great expense, in industrial "know-how." If management does not do its job properly, the plant will not be as efficient as it would otherwise be. Management must have the right under the contract to manage the plant efficiently if the efficiency principle considered above is to be followed.

[26] "Bidding for labor among employers has been more active than most economists have assumed. The picture of a helpless wage-earner dealing with a large employer, frequently pictured by economists, is not easily reconciled with the wage and price movements of the last century." Slichter, *Wage Policies*, 22 ACAD. POL. SCI. PROC. 3 (1946).

[27] Ford Motor Company's price policy is an outstanding example of fixing the price for mass sale and forcing the manufacturing costs down to the price.

[28] Educational programs for employees to explain to them how modern business operates are essential to the proper handling of an individual company's labor problem.

Management is charged with carrying out many policies. One of these policies is contained in the contract with the union. Therefore, it becomes management's job to manage the plant under this contractual policy. The management is always the "acting" party; there is no basis for the idea that, because a labor contract exists, the union shares jointly the obligation to manage the plant efficiently. That is solely management's obligation.

Many uninitiated observers of the labor union movement believed that as unions matured they could take on a joint function with management in running the everyday affairs in a plant. The fallacy in any such arrangement is revealed very directly by William Leiserson, formerly a member of the National Labor Relations Board and the Railroad Mediation Board, who said of the ill-fated attempt to administer the Office of Production Management under the dual leadership of Knudsen and Hillman:

> . . . The President was asked what would happen if they disagree. He answered they would work together and make joint decisions. This was taken as an indication that the government intended the business of defense production to be a joint co-operative enterprise of employers and workers on an equal partnership basis. . . . There developed a confused organization and administration. . . . The arrangement had to be discarded. . . .
>
> In retrospect it is easy to see the mistake that was made in establishing the double-headed directorship of the Office of Production Management. It was due to inadequate analysis of the job that was to be done and failure to distinguish functions. We do not have to be versed in the philosophy of management to understand that it is not practical to mix the policy-making functions of an organization with the operating functions.
>
> It does not work and it satisfied no one. It leads to maneuvering and argument. It leads to maneuvering and argument about policy among operating officials whose sole duty should be to carry out promptly and efficiently the operating orders. . . . It turns a production organization into a debating society.

The basic principles which are to guide the company in its labor relations are established in the union contract. Collective bargaining takes place when the basic policies are hammered out. From that point on, management must manage or the plant managers, instead of managing, become debaters in a debating society.

The concept of the labor contract as a contractual policy for a period was challenged in the most serious manner in a recent National Labor Relations Board case.[29] The board found the company guilty of a refusal to bargain under section 8(5) of the Act on (1) an employee's manual of plant rules,[30] (2) a change in working conditions in a department, (3) the company's policies concerning subcontracting work to outside contractors, (4) working schedules of maintenance employees, and (5) working schedules of pit-crane hands.

The company did not deny that it had failed and refused to bargain with the

[29] Timken Roller Bearing Co., 70 N. L. R. B. 500 (1946).

[30] This finding was not part of the final order because the right of the management to make necessary rules under the contract had been upheld in a final and binding arbitration, but the Board disagreed with the arbitration award and the refusal to negotiate the rules was found, in the opinion, to be a refusal to bargain.

union on these matters, but defended on the ground that, at the time the refusals to bargain took place, it had a contract in effect with the union and, therefore, the union had no standing before the NLRB in as much as its rights to bargain under section 8(5) were exhausted for the life of the contract when the contract was signed. At first blush, this decision appears to upset completely the concept that the labor contract is the master policy and that management can manage under it for the life of the contract. It appeared that the board was opening the flood gates and that managements would be forced to bargain collectively all the time. In that event, no one party would have the right to manage the plant; management would be a joint responsibility requiring constant negotiations and debate. If this case is construed as destroying the concept of stability for the period of the contract, stable relations and industrial peace will be almost unobtainable. The case need not receive such a construction, however. It is conceivable that an employer and a union could agree to a contract covering the recognition of the union only. Three days later, the company and the union could execute a contract covering seniority rights only. Three days later, the company and the union could execute a contract covering wages only, and thus the collective-bargaining process could continue until the parties finally agreed that all of the basic policy provisions had been worked out and that they would forego collective bargaining for a stated period of time. It is recognized by the National Labor Relations Board that unions can by contract give up their right to bargain.[31]

What the case does mean is that, if management's representatives at the collective-bargaining table are to obtain stability and are to avoid the creation of a "debating-society" condition in the plant, they must insist, once a full and complete collective contract has been negotiated, that the parties agree that the contract is a full and complete agreement and that there shall be no further collective bargaining for the life of the contract.

B. "Management Right" Provisions

Since efficient operation is necessarily a management function, the provisions of a labor contract should make it clear that management has the rights which are necessary to the performance of this function. It is interesting to note how this functional concept of management's rights has been reflected in the War Labor Board's decisions and in arbitration awards, which together are the only source of "common law" on rights of unions and managements under labor contracts. In considering various contract provisions, we have set forth quotations from these opinions to demonstrate that this "functional approach" is a practical approach to labor contract drafting.

1. *The Selection of Supervisors*

The selection and control of the supervisory force by management is necessary if the plant is to be managed efficiently. This was recognized by the War Labor

[31] Briggs Indiana Corp., 63 N. L. R. B. 1270 (1945).

Board, which vested selection and control of supervisors exclusively in the management.

In the *Stanolind Oil & Gas* case[32] a question of discipline of supervisors was involved. The board unanimously held that the "supervisor's removal or transfer *is solely the prerogative of management.*" In *Long Lake Lumber Company*[33] the referee said: ". . . the union cannot have a direct voice in the management of any company which does not wish to give it that voice and *it would be against public policy to order the removal*" of a particular individual as superintendent.[34]

The functional approach to management's rights, in a case involving management's right to select supervisors, was clearly relied upon by Dean Young B. Smith of the Columbia Law School in the *Wright Aeronautical Corporation* arbitration:[35]

> . . . *It is management which is responsible for results. This being so, the management should be free to manage.* To permit compulsory arbitration in matters affecting the business policies and the selection of men to direct the execution of those policies would, in effect, force upon management judgments of persons chosen as arbitrators who may know little or nothing about the business and plant problems involved and who bear no personal responsibility for the consequences of their awards. The operation of a great industrial plant like the Wright plant . . . is a task which can be performed only by men familiar with its organization and skilled in the work that is done. Tampering with the machine by unskilled hands would be a dangerous procedure and is not to be encouraged.

2. *Discipline of Employees*

The War Labor Board ruled that management has the right to discipline employees in the first instance, and that the union has only the right to challenge the propriety of such discipline. This was clearly demonstrated by the board's decision in the *Brewster Aeronautical* case,[36] where the union had obtained from the management through collective bargaining a clause which provided that the company must obtain the agreement of the union before it could discipline an employee. Because this clause took from the management its ability to manage, the board, contrary to its normal policy of supporting agreements reached by the parties, eliminated it from the agreement and returned to management the right to discipline the employees, permitting the union to challenge the disciplinary measure only after it had been taken.

In *General Motors Corp.*,[37] the National War Labor Board refused to limit the company's right to discipline by requiring prior consultation with the union repre-

[32] 20 WAR LAB. REP. 211 (1944). In this and the following quotations emphasis has been supplied by the authors.

[33] 12 WAR LAB. REP. 352 (1943).

[34] See also Allis-Chalmers Mfg. Co., 7 WAR LAB. REP. 297 (1943) and Winchester Repeating Arms Co., 6 WAR LAB. REP. 359 (1943).

[35] 13 L. R. R. MAN. 2580, 2582 (1943).

[36] 12 WAR LAB. REP. 40 (1943).

[37] 22 WAR LAB. REP. 233 (1945).

sentatives. It relied upon the same functional view of management's rights when it said in the *Norge Products* case:[38]

> Management's right to discipline employees for cause as necessary for the efficient operation of its business is recognized by this determination. . . . To say that management has no right to impose discipline in such a case would impose an insurperable obstacle in the way of management's performance of *its essential function.*

3. *Plant Rules and Regulations*

One of the important rights necessary to the efficient operation of a plant is the right to make rules and regulations. If rules regarding plant routines cannot be made without joint agreement between the company and the union, the ability of the company to manage the plant is infringed. The National War Labor Board recognized the employer's right to make such rules, one of its clear rulings on this subject being the *Rueben H. Donnelley Corporation* case.[39] The panel recommended that if agreement could not be reached on the rules, they be submitted to an arbitrator for final decision. The board rejected the panel's recommendation and entered an order with the following provisions:

> The company shall have the right to formulate such rules as may be necessary for the proper conduct of its business, provided such rules shall not abridge any rights of the employees as guaranteed by the terms of the collective bargaining agreement.
>
> The company shall have the right to discipline any employee for any violation of disciplinary shop rules.
>
> Any complaint that any employee has been unfairly treated or that he has been improperly disciplined, or any allegation that the rules formulated by the company for the conduct of its business have not been fairly applied may be taken up as a grievance in accordance with the grievance and arbitration procedure.

4. *Determination of the Number of Employees in a Crew*

One of the most significant cases ever decided by the National War Labor Board was that of the *American Smelting & Refining Co.*[40] The Sixth Regional Board (Chicago) had ordered the company to submit to arbitration the union's request that additional workers be employed in the furnace room. This order was appealed and the National Board said:

> That portion of . . . the directive order dated June 29, 1944, which directs that the union's request for the employment of additional workers for the furnace room be taken up under the grievance procedure, including arbitration, is set aside for the reason that *the request as stated* is not a proper subject for arbitration. . . .

This is an unmistakable decision that the establishment of the size of the working crews is a management function. It is consistent with the view that management

[38] 15 WAR LAB. REP. 651, 654 (1944).
[39] 15 WAR LAB. REP. 551, 553, (1944). However, see Timken Roller Bearing Co., 70 N. L. R. B. 500 (1946).
[40] 21 WAR LAB. REP. 163 (1945).

must have exclusive jurisdiction on such questions if the plant is to be efficient.[41]

5. *Establishment of Piecework Rates*

This is a live subject because unions are asking for the right to participate in incentive-rate setting. However, if the union obtains a veto power over the establishment of incentive rates the incentive program cannot properly be carried out. If each rate is to be established by bargaining, it will be impossible to set rates in accordance with any scientific or consistent method. Management, therefore, would be deprived of this method of obtaining efficiency from the plant.[42]

On this point, the War Labor Board took a strong position. In the *Cramp Shipbuilding* case,[43] the commission eliminated the practice of guaranteeing incentive rates 25 per cent above base rates; removed the joint control of company and union over day-to-day adjustments of piecework rates; provided that pay guarantees should be applied on a weekly rather than a daily basis; and provided that no incentive payment should be made for work which did not meet quality standards. The commission said:

> Up to the present time the union has held all the cards in this type of bargaining. *By this decision, the company is placed in the driver's seat.* If the company representatives fulfill their obligations in an equitable manner, the results should be satisfactory.

In the *Borg-Warner Corporation* case,[44] the union asked the Regional Board to order that the company negotiate any changes from hourly rates to piecework rates with the union and that an agreement be reached before such changes were made. The board denied this request and placed its decision squarely on the basis of management rights. This is shown by the fact that the labor members of the board said in a dissenting opinion:

> In this case, the company claims its right to change hourly rates to piecework prices, without union approval, as a management prerogative. . . . Such management prerogatives belong to the dead feudalistic past. . . .

The board's denial of the union's request was a refutation of the labor members' position.

6. *Job Evaluation*

The board granted to employers the right to define and evaluate the job.[45]

[41] Unions do not subscribe to limiting crew sizes to the efficient number. If efficiency is socially important, control over this and related questions must be placed in the management's hands. See Sumner H. Slichter in UNION POLICIES AND INDUSTRIAL MANAGEMENT (1941), listing nine ways in which labor unions "make work."

[42] The UAW-CIO would not make a good partner to handle day-to-day rate questions, for it said in its national policy statement (April, 1946): "We must . . . continue our efforts to eliminate the piece-work system entirely." Daily Lab. Rep. No. 79: E-1, 2 (April 19, 1946).

[43] 17 WAR LAB. REP. 753, 765 (1944).

[44] 14 WAR LAB. REP. 449, 453 (1944). See also Firestone Tire & Rubber Co., 9 WAR LAB. REP. 726 (1943); McQuay-Norris Mfg. Co., 9 WAR LAB. REP. 538 (1943).

[45] Gray Mfg. Co., 7 WAR LAB. REP. 401 (1943); Celanese Corp. of America, 7 WAR LAB. REP. 290 (1943).

Although a "basic change" in the job-evaluation plan was made subject to mutual agreement, the board, in the *United Aircraft Corporation* case,[46] directed the following clause:

> It is understood that the determination, operation, and administration of the job-evaluation plan effective in the company's plant *is a function and responsibility of management.* . . .

In *Western Electric Company,*[47] the board adopted the panel's report denying equal participation by the union in the administration of the company's job-evaluation plan. The panel said:

> The job evaluation plan could not function long *if there were divided direction* and every basic decision required joint agreement. The day-to-day operations of the plan must be left to the company to be carried on through the *specially trained staff which it organized for this very purpose.*

7. Merit Rating of Employees

The National Board recognized the functional principle in connection with merit rating of employees. In the *Consolidated Vultee Aircraft Corporation* case[48] it rejected a union demand for joint wage review for each employee every six months. The board's opinion, written by Public Member Lewis M. Gill, says:

> The main controversial item in this dispute had to do with the union's demand for joint participation with the company in the determination of merit increases and promotions. The management objected to making these matters the subject of joint determination on the ground that it is traditionally and properly a function of management to determine merit increases and promotions subject to the union's and the employee's right to contest any allegedly unfair determination through the grievance procedure. . . .
>
> After a lengthy discussion of this hotly contested issue, the Board has sustained the management's position and rejected the union's demand for a joint determination of merit increases and promotions, with the labor members dissenting. . . .
>
> The labor members have submitted a dissenting opinion protesting against the Board's failure to provide for joint determination of merit increases and promotions and have asserted that various court decisions indicate that the National Labor Relations Act prohibits unilateral determination of these matters by the company where there is a collective bargaining agency in the plant. Without burdening this opinion with an exhaustive legal analysis of this point, it is the view of the majority that the decisions referred to do not actually bear upon the point at issue here. As we read the decisions, they hold in substance that individual bargaining between the company and individual employees is only proscribed when it constitutes an evasion of collective bargaining with a duly designated union over rates of pay. *Where, as in this case, rate ranges have been established through regular collective bargaining procedures, we do not think that the decisions go so far as to hold that there must be joint bargaining over all merit increases and promotions within the framework of the ranges of rates thus established.*

[46] 21 WAR LAB. REP. 137 (1945).
[47] 19 WAR LAB. REP. 128, 135 (1944).
[48] 16 WAR LAB. REP. 159, 161-162 (1944).

That original merit rating is a function of management was the board's position in *Gerber Products Company*.[49] The opinion states in part:

> The union demands the abolition of the present merit-rating system. It does so on the ground that the employees do not know who makes the merit ratings and never see these ratings.
>
> The panel deemed this demand of the union to be unwarranted and the majority of the Regional Board concurs in the recommendation of the panel. In merit-rating systems generally the employees do not know who makes the ratings. While it may be desirable that the employees should know how they are being rated, this can by no means be considered a right of the employee. *Merit ratings are made primarily for the benefit of the employer. It would be a serious encroachment upon management rights if its rights to rate employees in accordance with its own standards were forbidden. We deem such a restriction to be unwarranted.*

8. *The Management Clause*

The management clause is actually the least important method of protecting management's rights. The reason for this is that management has all management rights before the collective bargaining contract is signed, and if no management clause existed in the contract, management would still have all the rights not bargained away elsewhere in the contract. Arbitrators normally hold that the management clause merely sets forth residuary rights and that it is subordinate to the other provisions of the contract.[50] The management clause, however, is often very helpful in settling grievances, and for that reason it should be included in the contract. To prevent infringement upon management rights in the future, such a clause should begin with a provision to this effect:

> It is understood and agreed that management possesses the sole right to manage this plant and that all management rights repose in it, but that such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following: . . .

After such a preamble, all of the basic management rights should be listed, as in the following clause taken from the directive order in the *United Aircraft Corporation* case:[51]

> It is recognized that the company has and will retain the sole right and responsibility to direct the operations of the company and, in this connection, to determine the number and location of its plants; the schedule of hours of work; the schedules of production; the methods, processes, and means of manufacturing; and to select and hire new employees, including the right to make rules and regulations governing conduct and safety: *Provided,* however, that none of these functions of management shall be exercised so as to abrogate or nullify any specific provision of this contract. It shall also have the right and responsibility to suspend or discharge any employee for just cause and to transfer or lay off because of lack of work or other cause. . . .

[49] 12 WAR LAB. REP. 74, 77 (1943), *aff'd* 12 WAR LAB. REP. 440 (1943).
[50] Bechtel-McCone Corp., 14 L. R. R. MAN. 2640 (1944).
[51] 18 WAR. LAB. REP. 9, 10 (August 1, 1944).

9. *Hours of Work*

The hours of work in many companies can be fixed by contract without interfering with management's function. However, where frequent changes were necessary in order to manage the business efficiently, the War Labor Board granted to the management the right to fix the hours of work. In the *Fairchild Engine and Airplane Corporation* case,[52] the National Board directed:

> Determination of the daily and weekly work schedules and the starting times of such schedules shall be made by the Company, and such schedules and starting times may be changed by the employer from time to time to suit varying conditions of the business after consultation with the Union.

It should be noted that the functional approach to management's rights means that management derives its rights from its obligation to manage efficiently so that the national standard of living will be improved. Heretofore, management's rights have been conceived of as prerogatives. The very word "prerogative" is an outgrowth of the feudal system, as it was a term attached to the rights of royalty. As applied to labor affairs, it means the rights which grow out of ownership. The legal concept of ownership is "control."[53] For example, when an individual has full ownership of a piece of land, he has complete control. When he places a mortgage upon the land, his control over the property is diminished, even though he may still own the title. The statement that management's rights grow out of ownership means that the owners, who have all rights because *they own the business,* delegate these rights to management. This theory brings unnecessary emotion into collective bargaining. Each challenge to the management's right to "control" is conceived by management and the owners to be an effort to *take over* control. Each resistance of management to such encroachments upon its prerogatives is decried by organized labor as a subordination of human rights to property rights. The "functional approach" avoids such issues because it is based on the public interest, rather than on the vested legal rights of one party.

C. The Union's Function Under a Labor Contract—The Watch Dog

During the life of the contract the union's concern is to see that management, in its everyday operation of the plant, does not violate the contractual policy. The union's function can properly be considered to be that of "watch dog," in contrast to the management's function, which is to carry the responsibility as the "acting" party for efficient operations.

If being the watch dog is the union's function, then the union must have the right under the contract to perform this function. The grievance procedure established by the contract provides the method by which the union challenges manage-

[52] 16 WAR LAB. REP. 633, 637 (1944).

[53] "Ownership is synonymous with control." City of Chicago v. Dorband, 297 Ill. App. 617 (1938). "An essential attribute of ownership is control." Standard Oil Co. of N. J. v. Powell Paving and Contracting Co., 144 S. C. 354, 142 S. E. 612 (1928).

ment on the ground that it has not followed the contract. Since the handling of grievances and the voluntary arbitration which commonly constitutes the final step in the grievance procedure are considered elsewhere in this symposium,[54] their discussion here must be limited to a brief statement of their purpose and function in the light of the general principles which should govern the collective-bargaining process.

D. Arbitration and the Grievance Procedure

The purpose of the grievance procedure is simply to provide a method whereby the union can obtain compliance with the contract itself. It should not be a method by which the union questions all of management's decisions, nor should it be written so that the union can force management to place questions of managerial judgment before outside arbitrators who bear none of the responsibility for mistakes of judgment. A "grievance" should be considered simply as an allegation that management has not properly followed a given provision of the agreed policy.

The grievance should be reviewed through a series of orderly steps, the first of which is normally a meeting between the aggrieved employee and his foreman. While the union steward should participate in this meeting if the employee so desires, union efforts to provide that the matter shall be handled solely through the steward as intermediary, without personal contact between foreman and employee, should be resisted, since the foreman is charged with the responsibility of maintaining morale and efficiency.[55]

In the second step the union is permitted to present the grievance to a higher management representative if it has not been satisfactorily disposed of by the foreman. At this stage the grievance should be stated in writing, and should be answered in writing by the management representative after conference with the union representatives. Time limits should be fixed both for the presentation of the grievance and for management's reply.

A further opportunity for appeal should be provided if the grievance is not disposed of at the second stage. Again the appeal should be taken within a limited period of time, and at this stage the reasons for the appeal should be stated in writing. If no conclusion is reached at this stage it is normal for the matter to be submitted to arbitration.

If contracts are written clearly the risks of arbitration will be kept to a minimum, since the arbitrator should have only the right to interpret the contract. The War Labor Board consistently limited the arbitrator's function to questions of in-

[54] See Katz, *Minimizing Disputes Through the Adjustment of Grievances,* and Frey, *The Logic of Collective Bargaining and Arbitration, supra.*

[55] See NLRB v. North American Aviation, Inc., 136 FED. 2d 898 (C. A. A. 9th 1943); Hughes Tool Co. v. NLRB, 147 FED. 2d 69 (C. A. A. 5th 1945); Celanese Corp. of America, 17 WAR LAB. REP. 510 (1944); Kent-Owens Machine Co., 14 WAR LAB. REP. 520 (1944); Art Metal Construction Co., 7 WAR LAB. REP. 137 (1943); Aluminum Co. of America, 12 WAR LAB. REP. 446, 454 (1943).

terpretation and application of the contract,[56] and the President's Labor-Management Conference in November, 1945, unanimously went on record against giving the arbitrator power to add to, subtract from, or modify any of the terms of the agreement.[56a]

The function of the arbitrator being to interpret and apply the agreement, the paramount importance of clear and specific drafting should be obvious. A provision that "the company will provide as safe and sanitary working conditions as possible," perhaps reflecting the company's pride in its safety record, is an extremely loose standard under which an arbitrator might rule, for example, that a union request for air conditioning should be granted. The company should provide some such clause as the following: "The company will provide safety appliances in accordance with the state labor laws and sanitary conditions consistent with standard industrial practice."

Wage increases involve the exercise of managerial judgment and should not be submitted to arbitration. The contract should set forth the rate ranges for the various job classifications, or should specifically exclude wage questions from the arbitration clause. Such clauses as "any inequalities in wage rates will be handled under the grievance procedure," surprisingly common in collective agreements, may open the entire wage structure to arbitration unless the contract establishes a definite, objective standard by which inequalities can be determined.

Clauses requiring employers to "continue in effect all benefits in effect on the date the contract is signed," or to "perpetuate previously granted privileges and benefits," obviously lead to misunderstandings and were uniformly denied by the War Labor Board.[57]

Obtaining courageous and intelligent men as arbitrators is a very practical problem. Dependence on fees tends to put pressure on the arbitrator to reach a solution by compromise, so as not to lose favor with either party. Ideally, arbitrators should be salaried men with tenure like that of federal judges. The steps being taken by the United States Conciliation Service to develop panels of disinterested arbitrators are steps in the right direction; and the publication of arbitrators' decisions furnishes an additional safeguard.

If unions conceive of themselves as standing on their own feet and as an effective factor in the national economy, it seems odd that they should ask the employer to pay their representatives for time spent in handling grievances on behalf of employees. Reasons for paying the union steward in the appeal steps of the procedure

[56] Anomosa Poultry & Egg Co., 18 WAR LAB. REP. 353 (1944); Independent Produce Co., 18 WAR LAB. REP. 388 (1944); Lewittes & Sons, 15 WAR LAB. REP. 454 (1944); Mills Novelty Co., 14 WAR LAB. REP. 654 (1944); Western Electric Co., 11 WAR LAB. REP. 537 (1943); Borg-Warner Corp., 6 WAR LAB. REP. 233 (1943).

[56a] *The President's National Labor-Management Conference*, D. L. S. BULL. No. 77 (U. S. Dep't Labor, 1946) 46.

[57] Coca-Cola Bottling Co., 20 WAR LAB. REP. 575 (1944); Illinois Bell Telephone Co., 15 WAR LAB. REP. 94 (1944); Western Union Tel. Co., 6 WAR LAB. REP. 133 (1943).

in particular are not at all clear. The War Labor Board approached this problem functionally. In the *McQuay-Norris Manufacturing Company* case[58] the board said:

> There are cogent reasons why, as a general proposition, a union should pay its officers and its committeemen for representing employees. *Such union representatives have a function to perform* which should be carried out on an independent basis.

Many unions emphatically reject the idea that management should pay union representatives acting in the performance of their duties; in such payments the emotions of paternalism are most vividly revealed. Some managements which bitterly dislike unionism are among the first to agree to give stewards full pay for grievance and bargaining activity—because they think of the stewards as their employees and as members of their family. Relations are better in the plants of employers who, accepting unionism as an established fact in modern business, treat the union as an independent bargaining agency standing on its own feet, and require the union members to bear the cost of such an agency.

The argument for compensation of stewards is that management is as much interested as the union in removing grievances. Such an argument might justify half pay for time spent in handling grievances, but does not justify any payment for time spent in contract negotiation. Since the handling of grievances may well be more attractive than working at a machine, it is important in considering the question of payment to union representatives to avoid possible incentives to spend more time than is necessary in handling grievances, or even to the stimulation of grievances in the plant.

E. The No-Strike, No Slow-Down Clause

Since the labor agreement is a contractual policy for a period of time, it should be lived up to by both parties. The grievance procedure is the union's method of obtaining compliance with the contract by the "acting party," that is, the management. Therefore, when the contract contains a final and binding arbitration clause there is no need for a strike to enforce compliance.

The most important thing that the union can give to the employer in the contract is its pledge that the employees will not strike during the life of the contract. Hence the no-strike pledge is the basic consideration flowing from the union to the company for the contract. Since this is the basic consideration, the management should have the right to compel the union and the employees to live up to their part of the contract.

For these reasons all possible enforcement provisions should be incorporated into this clause. For example, unions should be liable for money damages[59] and legisla-

[58] 9 WAR LAB. REP. 538 (1943).

[59] The United Steelworkers, CIO, finally approved a contract provision requested by the Murray Company of Dallas, Texas, which permits damages to be assessed by an arbitrator for work stoppages in violation of the contract. Business Week, Nov. 16, 1946, p. 15, col. 1.

tion should be passed to make them suable at law;[60] individuals who engage in strikes should be made subject to a fine which is deducted from their wages; the maintenance-of-membership clause, if there is one, should terminate automatically if there is a strike; and the employer should have the full right to discharge employees for striking.

Even if this last provision is not set forth expressly in the "no-strike" clause, the company has the right to discharge strikers if there is a "no-strike" clause in the contract.[61] This was the holding of the United States Supreme Court in the *Sands Manufacturing Company* case.[62] The War Labor Board also held that the strike leaders could be singled out and discharged,[63] and arbitrators have sustained discharges of strike leaders.[64]

The so-called "company security" clauses are merely attempts on the part of management to obtain compliance by the unions with their basic pledge in the labor contract. Therefore, it is surprising that unions go on record against such provisions. For example, the United Automobile Workers in its Policy Statement (April, 1946) said:

> We stand unalterably opposed to, and will struggle to prevent or eliminate, any and all types of arbitrary penalty systems which the corporations have falsely labeled "company security." Such arbitrary penalty systems undermine normal collective-bargaining relations which are essential to effective and genuine settlement of labor disputes.

After all, the public is interested in industrial peace, and the National Labor Relations Act was enacted and its constitutionality sustained in the belief that the right to organize and bargain collectively would reduce the number of strikes which interfere with interstate commerce. This concept of the purpose of the Act, and the position set forth herein that the pledge not to strike is the consideration for the promises of the employer, received a body blow in a recent report by an NLRB trial examiner.[64a] The examiner stated that since "the right to engage in concerted activities is . . . a public right established by the Act, . . . obviously employers cannot set at

[60] Voluntary associations, including labor unions, are not regarded as legal entities for purposes of suit in many states. Wilson v. Airline Coal Co., 215 Iowa 855, 246 N. W. 753 (1933); Grand International Brotherhood v. Green, 206 Ala. 196, 89 So. 435 (1921); Smith v. I. L. G. W. U., 58 Ga. App. 26, 197 S. E. 349 (1938). The rule of the Federal Courts is that they are suable if the law of the state in which the action is brought permits suit. Busby v. Electric Utilities Employees Union, 147 FED. 2d 865 (App. D. C. 1945).

[61] Many contracts are conditional no-strike agreements in that they are agreements by the union not to strike until the grievance procedure has been exhausted. Such clauses make disciplinary action most difficult because a question of fact is involved: that is, whether or not the grievance procedure has been exhausted.

[62] NLRB v. Sands Mfg. Co., 306 U. S. 332 (1939). See also NLRB v. Columbian E. & S. Co., 96 FED. 2d 948, 952-954 (C. C. A. 7th 1938); United Biscuit Co. v. NLRB, 128 FED. 2d 771, 774-776 (C. C. A. 7th 1942).

[63] Norge Machine Products, 14 WAR LAB. REP. 367 (1944), 15 WAR LAB REP. 651 (1944). See also Paragon Products Co., 18 WAR LAB. REP. 722 (1944).

[64] Fruehauf Trailer Co., 1 LAB. ARB. REP. 155 (1944); Borg-Warner Corp., 4 LAB. ARB. REP. 4 (1945); Robert-Shaw Thermostat Co., 14 L. R. R. MAN. 2621 (1944).

[64a] See 19 L. R. R. 305 (1947).

naught the Act by coercing labor unions, as a price of a contract, to disregard the statutory rights guaranteed to the employees they represent." The examiner recommended that the board find the employers guilty of the unfair labor practice of refusing to bargain in good faith because of their insistence on the basic pledge not to strike. This report, if sustained, will destroy completely the stability in labor relations which should be a primary product of the collective agreement.

F. Job Security and Preference Provisions

Employees have a latent fear of insecurity. This fear motivates a demand for job protection. The job protection provisions are found in the "seniority provisions" of the contract.

Seniority is essentially a policy or rule that the employee who has worked for the company a longer period of time has a prior right to a job at time of lay-off over another employee who has worked for the company for a shorter period. This concept sounds fair because it is based upon the simple rule, "first come, first served." However, approaching the question of seniority from the point of view of basic principles, we must be sure that it does not permit a work force to grow old and incompetent and that it does not prohibit the assimilation into the work force of younger, more active employees needed to keep the plant at maximum efficiency.

In addition to job protection, seniority provisions also cover job preferences. The unions claim that the oldest man in point of service has the first right to promotion. Length of service is urged as the sole basis for wage increases within the rate range for a given job classification. To protect one man's job over another because he has been there longer is one thing, but to promote a man to a more highly skilled and better paid job merely because he has been there longer than the other candidates for the job is another matter. With these distinctions in mind, let us examine the various applications of seniority to see whether they are consistent with the basic principles.

Industry, by and large, has not had enough experience with seniority to determine whether it has damaging effects. Observation of seniority in operation in other situations, however, does make the possibilities of injury to efficiency quite apparent. Civil Service rules, which are essentially rules to protect job security and, as such, are seniority rules, interfered with efficiency in the veteran's hospitals until General Bradley had special legislation passed lifting restrictions on the removal of incompetent employees. That the railroads have suffered from too much seniority is indicated by the fact that a man sixty-eight years old was at the throttle when the "Exposition Flyer" was involved in a serious accident at Naperville, Illinois, last spring. A system of examinations was substituted for seniority as the basis of promotion in the Detroit police department when studies showed that the younger, abler, and more intelligent patrolmen were leaving the force rather than wait for someone to die in order to make room for their advancement. Such illustrations of the operation of seniority as it operates in other fields constitute a warning. The public cannot

afford to permit a slow paralysis of industry to set in because of over-emphasis on length of service rather than merit, especially in promotions. Daniel T. Pierce, assistant to the president of Sinclair Oil Company, has said:[65]

> Over a period of years the employer in a seniority straight jacket, would find himself with a lot of old men who had laboriously climbed up from the ranks and had no greater ambition than to "get by" until retired. No new blood could be introduced into the organization except at the bottom of the ladder. The last man hired must be the first man fired in a lay-off, even if he is the best man on the job. No decent employer wants to scrap old and faithful employees, nor would he do so even if no seniority rules existed. But employers would do well to examine the seniority clause with great care; otherwise they may find themselves in a situation where promotions in all standard operations must be made on length of service only; and with an argument on their hands every time an out-of-line promotion is made. Worst of all is the deadening hand of the seniority fetish on ambition and unusual capability.

If a proper balance is maintained between length of service and merit and ability in the basic test for job protection and job preferences the decay can be avoided and at the same time the desires of the employees can be recognized.[66] The Army and Navy on July 18, 1942, issued a policy statement covering the plants they operated. This policy was endorsed by both the AFL and CIO and contained the following provision: "Seniority shall be a determining factor in matters affecting layoff and reemployment only if other factors of ability and aptitude are equal."

Interestingly enough, one individual who has had considerable experience with experimentation in social planning agrees most forcefully that merit must be recognized in the administration of wages (which includes promotions). This individual is Joseph Stalin. He said in a speech to the Russian factory managers on June 23, 1931:[67]

> In a number of establishments the wage rates are established in such a manner that the difference almost disappears between qualified labor and unqualified labor. . . . The unqualified laborer is not interested in becoming a qualified laborer. . . . *The qualified worker is forced to move from plant to plant in order to find such a plant finally as values qualified labor.*

If labor contracts cause the ambitious and able employee to lose incentive and his desire to obtain promotions to higher rated jobs because they contain a "straight" seniority plan on promotions, the public interest will not be well served.

The manner in which a seniority plan is established has a great bearing on whether or not merit and skill receive proper recognition. Under "plant-wide" plans the merit and ability test must be used more often and hence is exposed to the greatest strain. Under "job" seniority plans the merit and ability test is used less

[65] *How the Union Disillusioned Us,* Factory Man. and Maint., Jan. 1946, p. 94, col. 1; p. 97, col. 1.

[66] Time and time again the National War Labor Board included in its orders definitions of seniority with more emphasis on ability than on length of service. See Montgomery Ward & Co., 4 WAR. LAB. REP. 277 (1942); Dallas and Golden Belt Mfg. Cos., 3 WAR LAB. REP. 142 (1942); Automatic Transportation Co., 8 WAR LAB. REP. 1 (1943); General Motors Corp., 11 WAR LAB. REP. 167 (1943).

[67] ABRAM BERGSON, THE STRUCTURE OF SOVIET WAGES (1944) 178.

often and hence yields its maximum protection. A compromise between these two types is found in "departmental" or "occupational group" seniority plans. The more seniority groups there are in the seniority plan, the less likely it is that an unqualified employee will become a candidate for promotion to a job he cannot perform.

After the right to consider an employee's individual merit in cases of promotion is obtained in the contract it should be implemented by proper "merit rating" methods. The so-called "merit rating plans" which consist of charts containing many squares following words like "qualification," "attitude," "quality," and "quantity" do not perform this function properly. Such charts are better than a mere guess but are unpopular because they are considered by unions and employees to be plans which merely cover up the favoritism involved in promotions. Some leading companies, however, without unnecessary administrative burden, have developed methods of measuring relative ability on a highly objective and factual basis. Adopting such objective tests so as to rule out the possibility of favoritism is the best method of protecting the "ability" factor in labor contracts and is certainly the best method of developing the facts to win an arbitration case.

V.

THE WAGE QUESTION

Thus far, the one basic principle which we have considered most often, in connection with the various provisions of a labor contract, is the first principle, which is: collective agreements must not be permitted to interfere with industrial efficiency. In considering the question of the general wage levels established in collective contracts, we necessarily concern ourselves with the second and third principles, the maintenance of the proper incentives for job creation and the maintenance of adequate buying power.

This shift in the basic principles involved comes about because most of the provisions of a contract, except the general wage level provisions, affect the day-to-day operations in the plant *before* the goods are produced and sold to the customer. Hence, their influence upon plant efficiency is the prime consideration. The general wage provisions, on the other hand, involve the division of the income received *from* the sale of the products (that is, the division of the sales dollar between the wage earner and the investor) and the question whether the income from sales should be increased by a price increase. The wage level problem, therefore, calls the second and third principles into play.

It is necessary that this division of income be properly made. Sumner H. Slichter has stated the problem as follows:

> The effect of collective bargaining upon the maintenance of employment will depend in part upon how it affects investment opportunities in specific areas. . . . There is reason to believe that the wage policies of the building trades have limited investment in that field. To that extent the wage policies of the building trades have injured the standard of living for the nation. . . . Wisely and moderately used, collective bargaining may

turn out to be an effective instrument for stimulating industrial research and improving management. On the other hand, collective bargaining may reduce the return on investment to such a low level that large quantities of savings are kept in idle cash and will be an obstacle to a higher standard of living.

A. Profits Should Not be a Criterion for Wages

The risk in collective bargaining in so far as public welfare is concerned is that the investor's share will be reduced to such a point that new money will not flow into new enterprises and unemployment will result. In order to protect the share of the investor and to implement the second principle, the negotiating parties at the conference table must not make the profits of an individual company a criterion for establishing wage levels.

This principle was first recognized by the War Labor Board, but in reverse English.

In the *Detroit and Cleveland Navigation Company* case[68] the management contended that it could not pay the wage increase ordered by the board because to do so would be to force the company further into the red. The board, however, said:

> The panel and the Board fully understood and took careful account of the fact that the company is operating at a loss, and has been doing so for many years. The panel's recommendation has been approved on the familiar principle that, from the practical point of view of getting the service of the workers and from the more general point of view of equity and good conscience, an award of this kind should not provide a wage scale below the prevailing rate merely because the employer is unable to pay the going rate of wages in his labor market.

The increase was ordered in spite of the fact that, as the board said, "It is true that this well-accepted rule may in particular cases, and perhaps in this case, substantially affect the company's ability to stay in business. . . ."

This decision shocked industry and heaped upon the board intense criticism. It was claimed that the board, by such decisions, would destroy American industry. However, the board was consistent in its position and held that even though a company's profits were large that fact presented no reason why a wage increase should be granted.[69] Corporate balance sheets were almost unknown in board proceedings. Thus the board, ruthlessly if you will, decided in no uncertain terms that the profits of a company had nothing whatsoever to do with the wages which that company should pay.

The reasoning followed by the War Labor Board received a severe shock in the statement of President Truman in December, 1945, in which he said:

> In appointing a fact-finding board in an industrial dispute, where one of the questions in issue is wages, it is essential to a fulfillment of its duty that the board have the

[68] 2 WAR LAB. REP. 68, 69 (1942).

[69] Ability to pay was expressly declared not to be a factor in wage rate setting by the War Labor Board. Galveston Model Laundry, 26 WAR. LAB. REP. 224 (1945); Belle Alkali Co., 13 WAR LAB. REP. 315 (1943).

authority, whenever it deems it necessary, to examine the books of the employer. . . . Ability to pay is always one of the facts relevant to the issue of an increase in wages.[69a]

This point of view was rejected by General Motors Corporation when its representative, Walter Gordon Merrit, withdrew from the fact-finding panel with this statement:[70]

With this background and the revolutionary and uncompromising character of the union's proposals in mind, the corporation is unwilling to participate in the proceedings of this fact-finding board so long as its prices, profits and ability to pay—which are not facts but forecasts and estimates for the future—are to be regarded as proper factors in determining wages as applied to an individual business.

If profits become a criterion for setting wages, eventually a formula will be established to determine what percentage of the profits the risk takers (or owners) are entitled to. If such a formula were established, the pressure exerted by strong unions would make the share going to the owners smaller and smaller and would in time reduce, if not remove, the important profit incentive.[71]

In order to protect this principle—that profits are not a criterion for wages—it would seem that industry must recognize that it works both ways, and not attempt to force wages down *solely* because profits are reduced. The imposition of such reductions would justify the union in requesting wage increases if profits went up. Thus again profits and wages would be connected.

Using profits as a criterion for wages would satisfy neither the unions nor the employees. If General Motors had to pay a higher wage than Hudson because it made more profits, employees of the Hudson Motor Car Company performing the same type of work would complain bitterly that their union had taken a position which discriminated against their best interests. Furthermore, such a differential in wages could not exist, because the Hudson Motor Car Company would eventually be forced by the law of supply and demand to pay a comparable wage for comparable work. Using profits as a criterion would put a penalty upon efficiency and would therefore strike at the heart of the national standard of living. The tremendous publicity given to profits as a method of determining wage levels was largely a publicity venture designed to appeal to the rank and file employee, but the concept cannot stand the test of careful analysis.[72]

B. The Cost of Living

When the cost of living is rising, unions ask for wage increases to offset the rise. This seems a reasonable demand and certainly a natural one. All individuals would like to prevent a drop in their real wages. Nevertheless, if all groups of individuals

[69a] N. Y. Times, Dec. 21, 1945, p. 14, col. 3.

[70] N. Y. Times, Dec. 29, 1945, p. 2, cols. 1, 4.

[71] This problem is directly presented in the Nathan report, the CIO statistical study for the 1947 wage drive, which contends that all profits over 2.9% of net worth should be taken by the wage earners through wage increases.

[72] For a complete analysis of the question of profits and wages, see FRED ROGERS FAIRCHILD, PROFITS AND THE ABILITY TO PAY WAGES (1946).

attempt to prevent a drop in real wages by raising money wages as the cost of living increases, their efforts will fail. A rise in the cost of living means that there is more money available to buy goods than there are goods to buy, and an increase in wages under such conditions merely aggravates the difficulty.

The unions know the weakness of this theory because they do not subscribe to it when the cost of living goes down. The UAW-CIO, in its National Policy Statement (April, 1946), said:

> We oppose any plan to cut workers' wages if living costs decrease by a certain percentage. Such a wage-cut plan was incorporated in a St. Louis contract signed by the Garment Workers' Union. It must not be incorporated in any UAW-CIO contract.

In 1921, when the cost of living was decreasing, the report of the Executive Council of the AFL contained the following statement:

> The practice of fixing wages solely on the basis of the cost of living is a violation of the whole philosophy of progress and civilization, and, furthermore, is a violation of sound economic theory and is utterly without logic or scientific support of any kind.

Small craft unions are able to keep their real wages constant by increasing money wages without greatly affecting the national economy, but when large industrial unions follow this theory the amount of additional money put into the hands of consumers by wage increases causes the prices of all products to go up. This was clearly demonstrated in the Basic Steel settlement of 18½ cents, which was followed immediately by a price increase in February, 1946.[73] It was also demonstrated in the coal strike where the wage settlement was immediately followed by a price increase in coal.[74] The price increases in these basic industries affected the costs of all other industries and necessitated increases in prices for consumer products. Furthermore, these basic industry increases, along with increases in oil, packing, automobiles, and other key industries, set a so-called national wage pattern of 18½ cents which spread the increase throughout industry and raised nearly all prices.[75] The remedy for a rising cost of living is not higher wages, but more production and more efficiency.[76]

C. Industry Wage Scales

Unions often demand that all employers in the same industry pay the same wage

[73] Price relief averaging $5.00 per ton was granted to the steel industry simultaneously with the wage increase of 18½ cents. Daily Labor Rep. (BNA) A-13 (March 1, 1946).

[74] Coal price increases were granted simultaneously with the wage increase granted by the government after the coal mine seizure, equal to $1.35 per ton for coke, $0.40 to $1.15 for hard coal, and $0.10 to $1.47 per ton for soft coal. Daily Lab. Rep. (BNA) AA-5 (June 28, 1946); A-2 (June 25, 1946); A-2, E-1 (June 21, 1946).

[75] The Eighth Report of the Director of War Mobilization and Reconversion, October 1, 1946, stated that the average increase approved by the National Wage Stabilization Board between February 15 and June 30, 1946, was 14.7 cents, or slightly more than 3 cents less than the pattern of big industries.

[76] William Green, President of the AFL, disregarded rank and file desires and advised his members in July, 1946: "In this crisis labor must exercise iron self-discipline and restraint. We must refrain from causing any interruption of production, because production alone can save us." Chi. Daily News, July 30, 1946.

rate for similar jobs.[77] This is a natural request because it seems, at first, to be a request that wages be taken out of competition. The fallacy in this theory lies in the fact that differentials in wage rates between distant areas reflect differences in the productivity of the available labor in those areas, differences in transportation costs, differences in capital investment in the areas, and differences in labor supply. Geographic wage differentials tend to cause the flow of labor and capital into the areas where they are needed most. Hence industry-wide wage scales would tend to monopolize industry. Production would tend to concentrate in the geographic area having the maximum natural advantages and the most skilled employees.[78]

D. The Productivity Theory

As technological improvements are introduced into an industry, the unit cost of manufacturing diminishes. This saving in cost can either result in a decrease in price, an increase in profits, or an increase in wages. Statistics show that between 1840 and 1940 hourly earnings of non-agricultural workers rose about nine-fold, whereas the index of wholesale prices rose about 10 per cent. Since this period was one of tremendous technological improvement, it demonstrates that the wage-earner has received the benefit of increased productivity due to capital investment, which has constantly improved the machines used in industry. Some observers believe that the increased productivity of an industry can be projected into the future and that wages can go up against this normal increase in productivity each year. This increase in productivity has been estimated roughly at 3 per cent per year.[80] Such a theory sounds good, but the variations from industry to industry, company to company, are so great that an application of the theory is impossible.[81] This comment should not be taken to mean that productivity and wages are not directly related, but merely that the relationship is not sufficiently constant to support a wage theory.

[77] See the UAW-CIO National Policy Statement, Daily Lab. Rep. (BNA) E-1 (April 19, 1946).

[78] The War Labor Board established wage rates on the basis of area rate comparisons, rather than industry rate comparisons. In General Motors Corp., Case No. 111-6920-D (October 9, 1944), the board rejected the industry rate comparison approach in a case involving the Delco-Remy Plant at Anderson, Indiana. The labor members of the board dissented, stating that the decision was "neither good economy nor good sense," and that "should such a policy be persisted in, the result will be the drastic weakening of the union bargaining strength, not only in the war period but especially in the postwar era."

Similarly, the National Board stated in the Basic Steel decision: "*The union requests Board approval of a principle, stated as 'equal pay for similar work throughout the industry'* to be used as a guide in collective bargaining for the elimination of wage rate inequities. *This request of the Union is denied* . . ." 19 WAR LAB. REP. 568, 573 (1944).

[80] "Workers can expect to gain little by appropriating income at the expense of property because only about one-fifth of the national income goes to property. Furthermore labor as a whole cannot expect technological progress to raise wages more than about 3 per cent a year—unless industrial research achieves results far faster in the future than in the past. Any group which seeks to push wages by more than about 3 per cent a year is simply seeking to raise its income at the expense of other groups." Slichter, *Trade Unions in a Free Society*, Daily Lab. Rep. (BNA) D-1, 9 (October 8, 1946.)

[81] SOLOMON FABRICANT, EMPLOYMENT IN MANUFACTURING, 1899-1939 (1942) 102-104. Among 38 manufacturing industries, output per man-hour rose more than four times between 1909 and 1937 in two, but less than 67% in seven industries.

E. Area Wage Rates

There is only one objective test which properly can be used as a guide in wage setting. That is the wage rates paid in the labor market area concerned for comparable skills. This test simply reflects the basic law of supply and demand. If the wage rates in a community are high relative to those in other places, it is because the community is a favorable location for certain growing industries which are attracting labor by paying high wages. If in that community there is a company which cannot pay the prevailing wage rate, it is denying the labor which it uses to the more productive industry. The result is that it must either pay the prevailing wage rate of the community or move to some other location. If it moves, its labor force will be free to move into the more productive company, and the public interest will be better served by such a move.

Some companies are making an effort to apply this single test to the question of general wage levels. These companies select, with their unions, a list of companies in the community with which they compare wage rates. The company obligates itself, during periods when the wage question is open for negotiation, to review with its union these comparative figures and to adjust its wage level up or down in accordance with the results of the survey.

F. The Basic Factor Which Sets a Wage Level Under Collective Bargaining

The theories of wages discussed above are used in collective bargaining usually to find some objective reason for an offer or counter offer. Unions have a right to ask that a given company raise its wages above the level of community wages. They have a right to ask that the employees receive a greater share of the income received from the sale of products. How much of this increased share, if it is granted, should be given at the expense of the consumer or investor cannot be determined on a factual basis. The proper amount of profit accumulation for an established public utility or railroad would not satisfy the needs of the risk-taking investor in new enterprises such as television or the manufacture of helicopters. The investors in such fields must have a greater possibility of reward than investors in an established industry. How much this reward shall be to keep a given industry in a healthy condition and permit it to expand properly is not a factual question, but one of judgment. Therefore, when a union demands a wage increase which will bring it above the community wage level, the questions that immediately arise, if the increase is to be granted, are whether the share of the investor shall be diminished or the price to the consumer shall be increased. The government by announced policy should refrain from intervening at this point in the collective bargaining process, because third parties cannot make the judgment decisions which must be made on this question.

The wage level will be fixed at the point beyond which one of the two parties is unwilling to fight. If the union's willingness to strike exceeds the employer's willingness to stand a shutdown, the wage increase will be granted. If the em-

ployer's willingness to stand a shutdown exceeds the union's willingness to strike, the wage increase will not be granted.

If our economy is to be free we cannot permit boards, even of impartial men, to decide the most sensitive question involved in our national economy. Therefore a strike for a wage higher than the community level should be recognized as a "profit-price strike," and the parties should be permitted to settle the matter themselves.

VI.

CONCLUSION

The public interest is involved as much in the agreements *reached* by the parties in collective bargaining as it is involved in the strikes that result when they *fail* to reach an agreement. The strike is far more spectacular, but agreements which are contrary to the public interest can be far more damaging, even though their effects are more subtle than the chaos created by a national strike.

The compromise method of settling labor disputes without any principles makes agreements more difficult to reach because the demands of the unions become insatiable. To correct this condition certain basic principles must be adopted to establish the limits on this compromise process. When this is done, both parties will approach collective bargaining with a different frame of mind, agreements will be more readily reached, and strikes will be averted.

Because the parties to collective bargaining may not voluntarily accept these basic principles soon enough, they should be made applicable by legislation. This legislation should be "prohibitive legislation." By this we mean that the legislation should declare that agreements of a certain type are contrary to public policy and are unenforceable and void. This type of legislation, designed to protect the public interest, is exemplified in the Lea Act,[82] which declared that a union demand that a radio station employer hire more persons than he needs is contrary to public policy. That Act may be unconstitutional because it was legislation designed for a special class of case,[83] but the theory of the legislation was sound.

If proposed legislation controlling collective bargaining is prohibitive legislation rather than legislation establishing boards and tribunals which will make the decisions for the parties, collective bargaining can continue to operate within circumscribed but workable limits. It is more consistent with the American way of doing things for the legislature to say, "Thou shalt not agree as follows" than for the legislature to establish boards of individuals who say, "Thou shalt agree as follows." Once this distinction is lost, collective bargaining is gone forever and the economy becomes a controlled and directed economy.[84]

[82] 60 STAT. 89, 47 U. S. C. A. §506 (Supp. 1946).

[83] United States v. Petrillo, 19 L. R. R. MAN. 2088 (N. D. Ill. 1946).

[84] There is doubt whether a law setting up an industrial court or board with the power to establish wage rates and provisions for labor contracts during peacetime would be constitutional. Such a court was declared unconstitutional in Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 (1923). Chief Justice Taft said (at 544): "We think the Industrial Court Act, in so far as it permits

Prohibitive legislation can be designed for many of the subject-matters involved in the labor contract to protect the public interest.[85] It cannot, however, establish fixed tests which will control the question of general wage levels. Once the negotiating parties agree to meet the area wage level, the granting of further wage increases becomes a question of judgment and not of fact. Since these judgment questions cannot be decided by tribunals or be fixed by legislation, they must be decided by the parties themselves. It should be our objective to minimize the causes of strikes on all issues except wages and to permit free and unencumbered collective bargaining on that subject even though it may involve strikes.

If we are to have a free economy, we can go farther than to provide legislation designed to prevent injury to that economy by collective bargaining; if we establish boards to run the economy, it ceases to be free.

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the fixing of wages in plaintiff in error's packing house, is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law."

Since the date of that decision, however, many events have taken place, and the concept of public danger, which is followed in construing the constitutional provisions concerning individual rights, may have been broadened sufficiently to sustain such an infringement upon individual rights.

[85] The proposal set forth in LUDWIG TELLER, A LABOR POLICY FOR AMERICA (1945), is an example of legislation based upon the reasoning that certain types of agreements should be declared to be contrary to public policy.

THE SETTLEMENT OF CONTRACT NEGOTIATION DISPUTES: A COMPARISON OF PROPOSED LEGISLATION

JOHN S. FORSYTHE*

The problem of finding a procedure which will minimize mass work stoppages resulting from the failure to settle labor contract-negotiation disputes by collective bargaining has become of extreme importance to our national well-being since the end of the fighting in August, 1945. Even before V-J Day, the President and the Secretary of Labor, recognizing the possibility of serious industrial disputes in the reconversion period, were considering the advisability of calling a conference of the leaders of labor and management to discuss methods of reducing the major causes of industrial strife.[1] The decision was crystallized when the Secretary received a letter from Senator Arthur H. Vandenburg on July 30, 1945, suggesting that a National Labor-Management Conference be held to "lay the groundwork for peace with justice on the home front."[2]

In the more than three months between V-J Day and the conclusion of the conference,[3] the administration resisted pressure for new labor legislation[4] in the expectation that the conference would recommend a solution to the problem.[5]

Three days after the leaders of labor and management failed to agree upon any procedure to minimize work stoppages, the President requested the Congress to authorize the appointment of emergency fact-finding boards.[6] The Congress, however, refused to pass H. R. 4908, the Labor Fact-Finding Boards Act, and substituted,

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This article constitutes the opinion of the writer and does not represent official views of the United States Department of Labor.

[1] *The President's National Labor-Management Conference*, D. L. S. Bull. No. 77 (U. S. Dept. Labor 1946) 30.

[2] *Id.* at 29.

[3] The Conference met from November 5, 1945, through November 30, 1945. It was composed of thirty-nine members representing the United States Chamber of Commerce, the National Association of Manufacturers, the American Federation of Labor, the Congress of Industrial Organizations, the United Mine Workers of America, the Railway Brotherhoods, and the public. *Id.* at 32.

[4] In this period there were serious strikes in oil, coal, lumber, glass, textiles, trucking, and automobiles. (1946) 63 MO. LAB. REV. 874-876.

[5] Secretary Schwellenbach testified before the House Labor Committee: "As you all know, I took the position, after the conclusion of the war, and it was the position of the Administration, that we should not propose legislation; that we should get these representatives of management and of labor together and let them work out some procedure by which industrial strife could be minimized." *Hearings before Committee on Labor on H. R. 4908*, 79th Cong., 1st Sess. 130 (1945).

[6] H. R. Doc. No. 381, 79th Cong., 1st Sess. (1945).

instead, the provisions of the so-called Case bill, which met with a veto on June 11, 1946.[7]

The year following V-J Day shows the worst record of labor-management conflicts in the history of the United States.[8] It is not surprising, therefore, that the demand for a legislative solution to the problem has become overwhelming.[9] President Truman warned of this possibility when he opened the Labor-Management Conference with this admonition: "If the people do not find the answers [to industrial strife] here, they will find them some place else. For these answers must and will be found. The whole system of private enterprise and individual opportunity depends upon finding them."[10]

The scope of this article, as is indicated by the title, includes only those proposals which deal directly with the problem of minimizing or preventing strikes arising out of labor contract negotiation disputes.[11] Proposals designed to remove specific issues from the area of collective bargaining,[12] to restrict union power,[13] and to regulate strikes over issues other than contract negotiation disputes[14] will not be discussed at any length.[15]

The main body of the article has been divided into two sections. In the first a number of representative proposals[16] have been summarized in considerable detail; others have been mentioned briefly to give some indication of their place in the legislative pattern. In the second section common factors have been drawn from the various proposals to give a comparison of the procedures which have been suggested for the settlement of labor contract negotiation disputes.

[7] See note 19, *infra*, for a short summary of the legislative history of H. R. 4908.

[8] (1946) 63 MO. LAB. REV. 872.

[9] A recent Gallup Poll indicated that 66% of the persons questioned were in favor of new laws to control labor unions. Washington Post, Nov. 10, 1946, Sec. B., p. 1, col. 4. The Fortune Survey published in November 1946 showed that a startling 27.9% of the people favored a complete prohibition of all strikes for any reason whatever. Fortune, Nov., 1946, p. 10.

[10] *The President's National Labor-Management Conference*, D. L. S. Bull. No. 77 (U. S. Dept. Labor 1946) 40.

[11] With a few exceptions such proposals would set up machinery for one or more of the following procedures: mediation, conciliation, voluntary arbitration, fact finding, and compulsory arbitration. Proposals which would solve the problem by amendment to the National Labor Relations Act have been excluded because basic amendments to that act, such as would be accomplished by S. 360, introduced by Senator Ball, necessarily raise a number of difficult problems which cannot be adequately treated in the space allotted for this discussion.

[12] This type of legislation would prohibit the closed shop, the checkoff, and employer contributions to welfare funds except under specified conditions. Within this group also fall proposals to forbid or control the unionization of supervisory employees.

[13] These proposals would make unions subject to suit in the federal courts for breach of contract, provide penalties for acts of violence during a labor dispute, and amend the National Labor Relations Act to provide for "equality" under the law.

[14] This type of legislation would forbid jurisdictional strikes, boycotts, and other restraints, and strikes over the interpretation or application of the provisions of a collective agreement.

[15] Of the man days lost in work stoppages of 1,000 or more workers from V-J Day to June 30, 1946, 85.9% were due to disputes over wages and hours. (1946) 63 MO. LAB. REV. 886. While this figure will vary from time to time it does emphasize the relative importance of contract-negotiation disputes.

[16] Unless otherwise indicated all of the bills mentioned herein have been introduced in the first session of the Eightieth Congress.

I

1. *President Truman's 1947 Report on the State of the Union.*[17] The President, in the part of his report dealing with labor-management relations, proposed the following four-point program to reduce industrial strife: the enactment of legislation to prevent jurisdictional strikes, unjustified secondary boycotts, and the use of economic force to decide issues arising out of the interpretation of existing contracts; the extension of the facilities within the Department of Labor for assisting collective bargaining; the broadening of the program for social legislation to reduce the causes of workers' insecurity; and the appointment of a Temporary Joint Commission to inquire into the field of labor-management relations.

2. *S. 55, The Federal Labor Relations Act of 1947.*[18] This bill, frequently referred to as the Ball-Taft-Smith bill, is a revised version of the so-called Case bill[19] passed by the Seventy-ninth Congress and vetoed by the President. The significant differences between the pertinent provisions of the two bills will be indicated in this discussion of S. 55.[20]

Title I of the bill is directed to the problem of providing new federal mediation machinery. It would create a Federal Mediation Board in the Department of Labor. The five members of the board would be chosen by the President, with the advice and consent of the Senate, to serve for terms of five years at a salary of $12,000 per year.[21] All mediation and conciliation functions of the Secretary of Labor and all

[17] 93 Cong. Rec. 135 (Jan. 6, 1947).

[18] Introduced by Senators Ball, Taft, and Smith.

[19] To avoid confusion it seems advisable to review briefly the legislative history of the so-called Case bill and to indicate the terminology which will be used in referring to the various versions of that legislation.

H. R. 4908, the Labor Fact-Finding Boards Act, was introduced in the Seventy-ninth Congress on Dec. 5, 1945. A companion bill, S. 1661, was introduced in the Senate on Dec. 6, 1945. H. R. 4908, with amendments, was reported by the House Committee on Labor on Jan. 28, 1946 (H. R. REP. No. 1493, 79th Cong., 2nd Sess. (1946)). On the floor of the House a bill advocated by Representative Case (S. D.) was substituted for the committee bill and passed with amendments. The Senate Committee on Education and Labor, to which H. R. 4908 was referred, struck out the provisions inserted by the House, and, on April 16, 1946, reported a bill which had been written in the committee (SEN. REP. 1177, 79th Cong., 2nd Sess. (1946)). This bill was amended on the Senate floor, and, as passed by the Senate, resembled the bill which had previously passed the House. The Senate amendments were agreed to by the House on May 29, 1946. President Truman vetoed the bill on June 11, 1946; and an effort to pass it over his veto failed on the same day.

In the Eightieth Congress two bills, similar in many respects to the vetoed bill, have been introduced: S. 55 by Senators Ball, Taft, and Smith, and H. R. 725 by Representative Case (S. D.). The designation H. R. 4908 will be used to indicate the Labor Fact-Finding Boards Act as introduced in the House. The "Case bill" will be used to refer to the version of H. R. 4908 vetoed by the President. S. 55 will refer to the Ball-Taft-Smith version of the Case bill introduced in the Eightieth Congress. H. R. 725 will be used to indicate the labor relations proposal of Representative Case (S. D.) introduced in the Eightieth Congress.

[20] Title I of S. 55 is comparable to the first six sections of the Case bill.

[21] §1(f) provides for the appointment of an executive director and such conciliators and mediators as may be necessary.

the functions, personnel, records, property, and appropriations of the United States Conciliation Service would be transferred to the new board.[22]

The jurisdiction of the board is limited by the bill to disputes in industries affecting commerce. However, this jurisdiction is qualified in two respects. The board is required to avoid mediating disputes having only a minor effect on commerce where state or other conciliation services are available,[23] and to make mediation and conciliation services available only as a last resort and in exceptional cases in grievance disputes arising over the application or interpretation of a collective agreement. Within these limits the board may proffer its services either upon its own motion or upon the request of one of the parties to a dispute whenever, in its judgment, the dispute threatens to cause a substantial[24] interruption of commerce.

It is the duty of the board to assist parties to a labor dispute within its jurisdiction to settle the dispute through conciliation and mediation. Where these methods do not result in agreement within a reasonable time, the board is required to attempt to induce the parties to submit their dispute to voluntary arbitration. The board may, on the request of the parties, assist in drawing up the arbitration agreement, in selecting arbitrators, or in making any arrangements necessary to provide for arbitration. Section 2 (c) provides that if arbitration at the suggestion of the board is refused by either party the board must at once notify the Secretary of Labor and the parties in writing that its efforts at mediation and conciliation have failed. The parties are thereupon relieved of their duty under section 3(b) to refrain from engaging in a strike or lockout.

The bill provides that employers and employees in industries affecting commerce shall exert reasonable efforts to make and maintain collective agreements, including provision for adequate notice of change and provision for the final adjustment of grievances on questions regarding interpretation of agreements. They must also arrange for a collective bargaining conference promptly[25] on request of one of the parties whenever a dispute arises over the terms or application of an agreement, and co-operate fully with procedures undertaken by the board if the dispute is not settled by conference. No sanctions are provided for failure to comply with these provisions.

However, after the board has proffered its services, the parties are required by section 3(b) to refrain from engaging in a strike or lockout until the board certifies that its efforts at mediation have been concluded or until sixty days from the board's proffer of its services, whichever date occurs first. This provision emphasizes one

[22] The board would be in the Department of Labor for housekeeping purposes only. The Bureau of Labor Statistics would be required to maintain files of collective labor agreements and to furnish factual information which might aid in the settlement of any labor dispute. The office of the Solicitor of Labor would be called upon to furnish legal assistance to the board.

[23] This limitation was not present in the Case bill.

[24] The board's interpretation of "substantial" will serve as a further, albeit self-imposed, restraint on its jurisdiction. This concept of a "substantial interruption of commerce" was not in the Case bill.

[25] The Case bill specified that the conference should be held not later than ten days after receipt of written request therefor.

important difference between S. 55 and the Case bill. The latter required the parties to refrain from engaging in a strike or lockout from the time the board proffered its services until it certified that its efforts had been concluded or until sixty days from the giving of notice requesting a collective bargaining conference, whichever date occured first. The parties would therefore have greater control over the period during which they would be required to maintain the status quo under the Case bill than under S. 55.

Employees who violate section 3(b) would lose their status as employees for the purposes of sections 8, 9, and 10 of the National Labor Relations Act unless re-employed by the employer. An employer who violates section 3(b) would be guilty of an unfair labor practice within the meaning of section 8 of the National Labor Relations Act. The penalties are exclusive and no other legal or equitable remedy would be available.

The only major provision in that part of the Case bill being considered here which is omitted from S. 55 provided for the appointment of an emergency fact-finding commission by the President whenever a labor dispute involving a public utility, whose rates were fixed by a governmental agency, threatened such a substantial interruption of an essential monopolized service as to make it necessary in the public interest to appoint such a commission.

Title II of S. 55 does not fall within the scope of this article. It deals with royalty payments to unions, supervisory employees, union liability for the breach of a collective contract, boycotts, jurisdictional strikes, and registration of labor organizations.

3. *S. 73.*[26] This bill is similar to Title I of S. 55. It differs only in that it would establish a Federal Mediation Board completely independent in all respects of the Department of Labor, and in that it would not impose any waiting period while the board attempts to settle a dispute.

4. *H. R. 725, The Industrial Relations Act of 1947.*[27] The provisions of this bill relating to the establishment of machinery for mediation and conciliation, voluntary arbitration, and fact finding[28] are substantially the same as the comparable sections of the Case bill.[29] They differ in the following important four respects: the mediation and conciliation functions of the Government are placed by this bill in an Industrial Disputes Commission, completely independent of the Department of Labor; a more formal procedure for voluntary arbitration is established; a broader authority is granted to create fact-finding commissions; and a recommendation by the commission, if accepted by a majority of the employees, becomes binding on both parties for a period of six months from the date of the report. Section 20 of the Clayton Act[30] is amended to forbid strikes in an essential monopolized service or industry,

[26] Introduced by Senator Morse.
[27] Introduced by Representative Case (S. D.).
[28] Title II and §§301, 302(b), and 302(c) of Title III.
[29] §§1-6. These sections were discussed in connection with S. 55.
[30] 38 STAT. 738 (1914), 29 U. S. C. §52 (1940).

which would burden or obstruct commerce in such a way as to endanger the public welfare, health, or safety, after the President has authorized the creation of an emergency fact-finding commission for a particular dispute.[31]

5. *S. 404, The Federal Mediation Act of 1947.*[32] This bill is very similar to S. 55. Its comparable provisions differ in only two significant respects from Title I of that bill. They contain a provision for fact-finding in appropriate cases and establish a sixty-day waiting period in disputes affecting commerce by requiring that the parties incorporate a clause in their contracts which would require a sixty-day notice of any intention to request a change in the terms or conditions of an existing agreement.

6. *H. R. 301.*[33] This bill is similar in many respects to the first six sections of the Case bill. However, there are a number of differences which will be briefly indicated. H. R. 301 would retain the mediation and conciliation functions of the Government in an expanded and strengthened Conciliation Service in the Department of Labor. A Labor-Management Advisory Committee would be appointed to advise the Secretary of Labor on labor relations matters and to make recommendations for a permanent panel of arbitrators. Employers and employees in any industry affecting commerce would have the following duties: to exert every reasonable effort to make and maintain agreements concerning working conditions, including provision for notice (ninety days in the case of a public utility and sixty days in other industries affecting commerce) of any proposed change in the terms of such agreement; to submit disputes over the interpretation of the terms of a contract to binding arbitration if not settled by conference; to refrain from strikes or lockouts whenever the Conciliation Service proffers its services until the expiration of the sixty- or ninety-day notice, as the case may be, or until the Director certifies that mediation has failed, whichever date occurs first; and to co-operate with the procedures of the Conciliation Service if the dispute is not settled in conference. An employer who fails to perform any of these duties will be deemed to have engaged in an unfair labor practice within the meaning of the National Labor Relations Act. An employee who fails to perform any of these duties will lose his status as an employee for the purposes of the National Labor Relations Act.

7. *H. R. 34, The Public Rights in Labor Disputes Act.*[34] The policy of H. R.

[31] It is not clear from the language of §302(b) whether the bill would only forbid a strike in an essential monopolized industry or service when the President has authorized the appointment of a commission to investigate a dispute in that particular industry or service, or whether such a strike would be forbidden whenever any dispute is being investigated by an emergency commission.

[32] Introduced by Senator Ellender.

[33] Introduced by Representative Smith (Me.).

[34] H. R. 34 is one of five identical bills introduced in the Eightieth Congress, First Session, by Congressmen Case (N. J.), Herter, Hale, Auchincloss, and Heselton. The other bills are H. R. 17, H. R. 68, H. R. 75, and H. R. 76. Similar bills with two minor differences were introduced in the Seventy-ninth Congress, Second Session, by the same Congressmen, as H. R. 6912, H. R. 6913, H. R. 6914, H. R. 6915, and H. R. 6916. The bills are based on suggestions made by Professor Sumner H. Slichter, Lamont Professor of Government at Harvard University. *Hearings before a Subcommittee of the Committee on Labor on H R. 6912*, 79th Cong., 2nd Sess. 251 (1946).

34 is to prevent labor disputes affecting commerce from endangering public health or safety and at the same time to provide additional facilities for the peaceful settlement of labor disputes. To carry out this policy the bill would (1) create an independent agency, the Labor Disputes Conciliation Administration, in which would be vested the mediation and conciliation functions of the Government, (2) establish a Labor-Management Advisory Committee to advise with the Conciliation Administration and to recommend members for an arbitration panel to be maintained by the Conciliation Administration, and (3) require compulsory arbitration of disputes affecting commerce which endanger the public health or safety and which the parties cannot settle by voluntary means.

The Labor Disputes Conciliation Administration would be under the direction of an administrator appointed by the President by and with the advice and consent of the Senate.[35] The United States Conciliation Service would be abolished and its records and property transferred to the Labor Disputes Conciliation Administration. Thereafter no officer or employee of the Department of Labor would be permitted to perform any conciliation functions in labor disputes.

The agency thus created would have the broad function of offering conciliation services in connection with labor disputes affecting the interests of the public. It would also have the duty of maintaining a permanent panel of arbitrators, composed of not less than thirty individuals, appointed by the President by and with the advice and consent of the Senate.

A Labor-Management Advisory Committee, consisting of seven members representing labor and seven members representing management, would be appointed by the President, by and with the advice and consent of the Senate, to serve on a per-diem basis to advise the administrator with respect to the administration of the act. This committee would also have the duty of recommending a list of qualified persons[36] from which the President could make nominations to the panel of arbitrators maintained by the Conciliation Administration. The advisory committee would have considerable influence on the selection of individuals to serve on the panel of arbitrators for, while the President would not be required to accept the recommendations of the committee, if he nominated an individual not on the list he would be required to state to the Senate his reasons for believing the individual so nominated to be better qualified than those recommended by the committee.

The compulsory arbitration features of the bill would become operative whenever the President finds that a public emergency[37] exists or is imminently threatened as

[35] The President may appoint as many as three assistant administrators, by and with the advice and consent of the Senate.

[36] The list must contain at least two names for every vacancy on the panel which is to be filled.

[37] §3(a) defines a "public emergency" as existing when transportation, public utilities, or communication services essential to the public health or safety, or supplies of articles or commodities essential to the public health or saftety, have been suspended or substantially curtailed because of a labor dispute affecting commerce (whether or not the parties to the dispute are engaged in furnishing such services, articles, or commodities).

a result of a labor dispute affecting commerce, that the public health or safety is endangered thereby, and that local governmental mediation and conciliation facilities have failed or are not available to prevent the work stoppage. The bill provides that, on making such a finding, the President shall issue an order to the parties to the dispute (1) prohibiting the calling or authorizing of any lockout or work stoppage and prohibiting any assistance to the lockout or work stoppage whether by picketing, payment of strike benefits, or otherwise, (2) directing that all lockout or work stoppage orders and authorizations be withdrawn, and (3) directing the parties to refrain from practices which change the situation existing when the dispute arose or which, by changing an existing situation, caused the dispute.

Notwithstanding the provisions of the Norris-LaGuardia Act,[38] the United States district courts would have jurisdiction, but only on the petition of the Attorney General, to compel compliance with the President's order by injunction, restraining order or other appropriate process.

When the President has issued an order in a public emergency, it would become the duty of the parties to reach a settlement by voluntary means. If they have not settled the dispute or submitted it to voluntary arbitration within thirty days after the issuance of the order, the President would be required, within fifteen days after the expiration of such thirty-day period, to direct that the dispute be submitted to arbitration and that the parties comply with the award.

Each party would thereupon be required to select an arbitrator from a permanent panel of arbitrators maintained by the Conciliation Administration. In case of a refusal to select an arbitrator from the panel, the bill would give the administrator the duty of making a selection for the refusing party. The arbitrators thus chosen would select a third arbitrator, either a member of the panel or some other individual. The award of the arbitration board could be made retroactive and would be binding on the parties for a period of six months unless modified by mutual consent. In determining the character of the award to be made, the arbitrators must take into consideration the fact that the employees' right to strike has been restricted in the interest of the public health and safety; that they therefore should have, in relation to others not so situated, at least as favorable a status in the matter of terms and conditions of their employment.[39] The award could be enforced in the same manner as an award under the United States Arbitration Act.[40]

8. *A System of Labor Courts.*[41] Under this plan a national system of labor courts would be established which would parallel the present federal court system.

[38] 47 STAT. 70 (1932), 29 U. S. C. §101 *et seq.* (1940).

[39] This provision is the major difference between H. R. 34 and the bills introduced in the Seventy-ninth Congress mentioned in note 34, *supra.*

[40] 43 STAT. 883 (1925), 9 U. S. C. §1 *et seq.* (1940).

[41] A bill has been introduced by Senators Ferguson and Smith to establish labor courts in eleven districts with jurisdiction over the interpretation and enforcement of collective bargaining agreements and over interpretation of existing labor laws. Such courts would have no jurisdiction over the bargaining process and no power to end a strike resulting from failure to reach agreement on a contract. N. Y. Times, March 20, 1947, p. 1, col. 4. This summary, prepared before the bill was introduced, is based

Lay judges would outnumber legal judges by one on each court. All labor contracts affecting interstate commerce would be filed with a district court, and any disagreement over the terms of a contract which could not be settled by the parties would be submitted to the court for final settlement. In disputes involving basic industries or public utilities (such as basic steel, coal, oil, gas, shipping, railroads, electric power, telephone and telegraph), when the parties could not agree upon the terms of a contract, the court would act as a board of arbitration and issue a binding decision. The courts would also have authority to make binding awards in jurisdictional disputes between unions. Court orders would be enforced in two ways: by disbarring any labor or industry representative who defied the court verdict, and by fines against recalcitrant unions or corporations.

9. *H. R. 1095, The Industry-Wide Labor Disputes Act of 1947.*[42] This bill would require that labor disputes be submitted to arbitration if they threaten such an interruption of commerce[43] as would adversely affect the national health or safety. The refusal of either party to accept the arbitration award would result in federal seizure and operation of the plant, mine or facility involved in the dispute.

10. *H. R. 787.*[44] This proposal would permit the Government to seize any plant, mine or facility affected by a labor dispute which the President determines is a threat to the operation of an industry essential to the public health or security and the national economic structure. An employer engaged in a lockout, or officers or agents of a union engaged in a strike or slowdown, would be placed under a duty to take affirmative action to terminate the strike or lockout. A failure to perform this duty would result in a fine or imprisonment. Employees who fail to return to work would lose their status as employees under the National Labor Relations Act or the Railway Labor Act. In addition, the Attorney General would be

upon an article by Senator Ferguson in the February, 1947, issue of the *American Magazine*, reprinted in 93 Cong. Rec. 291-292 (Jan. 13, 1947).

Gerard D. Reilly, former member of the National Labor Relations Board and former Solicitor of the Department of Labor, has suggested that the National Labor Relations Board, with some changes in its internal structure, could assume the role of a national labor court to prevent activities meeting with the disapproval of Congress. However, unlike most other proponents of compulsory arbitration, Mr. Reilly suggests the doubtful wisdom of requiring arbitration of issues which cannot be settled by reference to the terms of a contract unless Congress at the same time formulates standards for the guidance of the arbitrator. The Washington Sunday Star, Oct. 13, 1946, sec. C, p. 1, col. 1.

[42] Introduced by Representative Landis.

[43] §2(b) would define commerce to apply ". . . only to those businesses, industries, utilities, and activities conducted for private gain, whose productive effort, as distinguished from sales effort or purchases, lies within the jurisdiction of the police power of two or more States, or of the District of Columbia or any Territory of the United States and any State or other Territory, or of any foreign country and any State, Territory, or the District of Columbia, and those businesses, industries, utilities, and activities conducted for private gain, whose operations were or would have been prior hereto, subject to Federal license, or to the regulation of the Federal Power Commission or the Interstate Commerce Commission." This definition would, upon the passage of this act, become the definition of commerce in all federal acts or parts of acts which govern, regulate, or supervise relations between employers and employees, with the exception of the Railway Labor Act. One obvious result of this provision would be to remove many employees from the protection of the National Labor Relations Act, the Fair Labor Standards Act of 1938, and many other federal statutes passed for the benefit and protection of employees.

[44] Introduced by Representative Smith (Me.).

authorized to petition the appropriate United States district court for injunctive relief. The seizure order could be nullified by a concurrent resolution passed by the Senate and House of Representatives within ten days of the issuance of the order.

II.

A. MEDIATION, CONCILIATION AND VOLUNTARY ARBITRATION PROPOSALS[45]

1. *Administrative Provisions.* The question of where the mediation and conciliation functions of the government should be vested has been met in three ways. One bill, H. R. 301, would keep these functions in the present United States Conciliation Service in the Department of Labor.[46] S. 55 and S. 404 would create a new Federal Mediation Board, in the Department of Labor for housekeeping purposes only; while H. R. 725, S. 73, and H. R. 34 would place such functions in completely independent agencies. H. R. 301 and H. R. 34 have two administrative features in common. They would establish a Labor-Management Advisory Committee to advise with the agency invested with the conciliation and mediation functions in labor relations matters, and they would vest such functions in a single individual. Other proposals would place the mediation and conciliation functions in a board or commission.

2. *Jurisdiction over Labor Disputes.* Only one bill, H. R. 34, would grant jurisdiction over any dispute which has affected or may affect the public interest. The jurisdiction in H. R. 725, S. 73, and H. R. 301 is limited to disputes in any industry affecting commerce. S. 55 and S. 404 provide that jurisdiction may be assumed whenever a dispute in any industry affecting commerce threatens to cause a "substantial interruption" of commerce, and that mediation should not be attempted whenever the dispute would have only a "minor effect" on commerce. All of the proposals provide that, within the limits set forth in each bill, the agency may proffer its services for conciliation and mediation upon its own motion or upon the request of one of the parties to the dispute.

3. *Voluntary Arbitration.* If agreement is not obtained by mediation and conciliation within a reasonable time, all of the proposals, with the exception of H. R. 34,[47] require the administrative agency to seek to induce the parties to submit their dispute to binding arbitration. If arbitration at the suggestion of the agency is refused by either party, the agency is required to notify the Secretary of Labor and the parties that its efforts at mediation and conciliation have failed. This notice releases the parties from the duty to observe any waiting period applicable at that time. In addition to the notice of the failure of mediation and conciliation, H. R.

[45] Bills discussed in this subsection are S. 55, S. 73, S. 404, H. R. 34, H. R. 301, and H. R. 725.

[46] The National Labor Management Conference unanimously recommended ". . . that every effort be made toward the reorganization of the United States Conciliation Service to the end that it be established as an effective and completely impartial agency within the U. S. Department of Labor." *The President's National Labor Management Conference,* D. L. S. Bull. No. 77 (U. S. Dept. Labor 1946) 48.

[47] H. R. 34 is primarily intended to provide machinery for compulsory arbitration.

301 requires that the Director of Conciliation submit a detailed explanation of the positions of the parties in relation to the dispute and the facts relative thereto as found by the Conciliation Service in its conferences with the parties. This report must be published in full by the Secretary of Labor. If the parties accept arbitration, S. 55, S. 404, S. 73 and H. R. 301 contain provisions requiring the agency to assist, at the request of the parties, in formulating the agreement to arbitrate, in selecting arbitrators, and in making such other arrangements as may be necessary. H. R. 301 would, in addition, establish a panel of arbitrators from which the parties could select an arbitrator or arbitrators if they so desired. If the parties accept voluntary arbitration under H. R. 725, each party is required to select three arbitrators. The six arbitrators thus chosen are then required to select three additional arbitrators from a panel made up of persons appointed by the President and confirmed by the Senate.

4. *Waiting Period During Which Parties Must Refrain from Strikes or Lockouts.* With the exception of S. 73 and H. R. 34, which do not provide a penalty for engaging in a strike or lockout while the Government is endeavoring to mediate a dispute, all of the proposals have differing provisions on this feature of the settlement machinery. H. R. 725 requires the parties to refrain from engaging in a strike or lockout from the time the board enters the dispute until it notifies the Secretary of Labor and the parties that efforts at mediation and conciliation have failed, or until sixty days from the request for a collective-bargaining conference, whichever date occurs first. S. 55 has the same provision except that the sixty day period runs from the time the board enters the dispute. In both bills an employer who violates this provision is deemed to have engaged in an unfair labor practice within the meaning of the National Labor Relations Act; an employee who violates the provision will lose his status as an employee within the meaning of that Act unless he is re-employed by the employer. S. 404 would require the parties to include in all future collective contracts, covering employees in industries affecting commerce, a provision for sixty days' notice of any intent to change the terms of the agreement. The contract must also provide that, if notice is not given sixty days prior to the termination date, the contract will remain in effect until sixty days after notice is given; that, for the first thirty days of the sixty-day notice period, the parties will engage in collective bargaining in good faith; and that, if unable to reach an agreement within that period, they will submit the issues still in dispute to the board of conciliation and mediation. Employers who refuse to incorporate such provisions in their contracts or who fail to carry out such provisions will be deemed to have engaged in an unfair labor practice, and similarly recalcitrant employees will lose their status as such under the National Labor Relations Act. This proposal also places a duty upon employers and upon union officials and agents to take affirmative action to rescind or terminate any strike or lockout during the waiting period which was called at their instance or with their consent. Willful violation of this provision

will bar the individual, for one to five years, from acting as a collective bargaining representative of any employer or employee, or from serving as an officer in any corporation engaged in an industry affecting commerce, or from serving as an officer of any labor organization representing employees in an industry affecting commerce.

H. R. 301 would require the parties to provide in their contracts for a sixty-day notice of any proposed change in the terms of the agreement; ninety days would be required in the case of a public utility. The bill would also require the parties to refrain from engaging in a strike or lockout whenever the Conciliation Service proffers its services and until it certifies that its efforts have failed or until the expiration of the sixty- or ninety-day period, whichever date occurs first. Violation of either provision by an employer would be an unfair labor practice. An employee guilty of a violation would lose his status as an employee under the provisions of the National Labor Relations Act.

B. FACT-FINDING PROPOSALS[48]

1. *Authority to Use the Fact-Finding Procedure.* The fact-finding procedure tends to be limited to the most important disputes. H. R. 4908 would have granted the President authority to establish a fact-finding board whenever the Secretary of Labor certified that a labor dispute seriously threatened the national public interest. H. R. 301, which has the same provisions for fact-finding as were contained in the Case bill, would limit the President's authority to disputes involving a public utility whose rates are set by a governmental agency. In such a dispute the President would be authorized to create an emergency commission after the Secretary of Labor has determined that the dispute threatens a substantial interruption of an essential monopolized service. S. 404 and H. R. 725 not only contain broader provisions for the use of fact-finding, but they also provide that the necessary finding shall be made by the President without first requiring any recommendation from an official experienced in labor relations problems. The President would have authority, under S. 404, to create a fact-finding commission when he makes a finding that a dispute in an essential industry threatens to result in such interruptions to the supply of goods or services essential to the public health or security as seriously to endanger the public welfare. The provisions of H. R. 725 authorize the President to create an emergency fact-finding commission under the following circumstances: at the request of the parties to any labor dispute affecting commerce; whenever he determines that any labor dispute endangers the public welfare, health, or safety;[49] or whenever the Industrial Disputes Commission reports that a dispute affecting commerce threatens a substantial interruption of an essential monopolized service.

2. *Duties and Powers of the Fact-Finding Commission.* H. R. 725, H. R. 301,

[48] The bills discussed in this subsection are S. 404, H. R. 4908, H. R. 725, and H. R. 301. H. R. 4908, the Labor Fact-Finding Boards Act, while not before the present Congress, contains several provisions which are not found in the other bills and therefore adds to the discussion of the fact-finding technique.

[49] The authority under this clause is not limited to disputes "affecting commerce."

and S. 404 contain similar provisions on this point. All would require the commission to investigate the facts in the dispute and report within thirty days. The recommendations would be limited to wages, hours, and working conditions but the report could describe other issues involved in the dispute. The report would be made public by the President. H. R. 4908 differs in two important respects. Under it the commission would be authorized to investigate all the facts which it deemed relevant to the dispute and to submit findings of fact and such recommendations as it deemed appropriate. It would also be clothed with the power of subpoena. In all bills the time for submitting the report could be extended by agreement of the parties and with the permission of the President. With the exception of H. R. 725, the statutory procedure would end with the submission of the report of the commission; it would then be up to the parties to accept or reject the recommendation. However, H. R. 725 provides that the recommendations of the commission shall be binding on both parties in any of three situations: when accepted by them, or when accepted by an employer and the representatives of the employees, or when accepted by a majority of the employees in a secret vote. The balloting would be conducted by the National Labor Relations Board, when requested by the President, if the union representatives have not accepted the recommendations of the commission within five days after the report is filed. If a majority of the employees accept the recommendations, they become binding on both parties for a period of six months from the date of the report.

3. *Duties of Employers and Employees.* All of the bills require the parties to maintain the status quo from the time of the appointment of the fact-finding commission. The waiting period runs until the submission of the commission's report in S. 404, until five days after submission of the report in H. R. 725 and H. R. 4908, and until fifteen days after submission of the report in H. R. 301. S. 404 also places a duty upon the employer and union officials or agents to take affirmative action to stop any strike or lockout during the waiting period which is called at the instance or with the consent of such employer, officer, or agents. Except for H. R. 4908, which provides no sanctions, the bills uniformly punish a failure to maintain the status quo during the waiting period by making the employer subject to an unfair labor practice charge before the National Labor Relations Board and by denying an employee the protection of the National Labor Relations Act unless he is reemployed by his employer. The willful failure of an employer or a union official or agent to carry out the duty to take affirmative action imposed by S. 404 would result in his being prohibited, for one to five years, from acting as a representative of any employer or employees in an industry affecting commerce, from serving as an officer in any corporation engaged in an industry affecting commerce, or from serving as an officer of any labor organization representing employees in an industry affecting commerce. H. R. 725 carries an additional feature not found in any of the other fact-finding bills. It would amend the Clayton Act[50] to make a

[50] 38 STAT. 738 (1914), 29 U. S. C. §52 (1940).

strike illegal in an essential monopolized service or industry, if it results in placing a burden on commerce endangering the public health, welfare, or safety, after the President has authorized the creation of an emergency fact-finding commission for a particular labor dispute.[51] Violators of this provision would be subject to civil or criminal action by the Attorney General under the provisions of the Clayton Act.

C. COMPULSORY ARBITRATION PROPOSALS[52]

1. *Jurisdiction of Arbitration Boards.* Proposals which would settle labor disputes by compulsory arbitration limit that procedure in general to cases in which a finding has been made that the dispute threatens a substantial interruption of an industry vital to the public health, safety, or welfare. In H. R. 268 and H. R. 34 the finding must be made by the President; in H. R. 1095 it must be made by the President and the Secretary of Labor or the President and the governor of any affected state. The jurisdiction of the labor courts to deal with collective-bargaining disputes would be limited to basic industries and public utilities engaged in interstate commerce.

2. *Compulsory Arbitration Procedures.* H. R. 268 employs a fact-finding procedure. After the President has made the necessary finding, he would appoint a commission to investigate the dispute and to make a recommendation. The parties must accept this recommendation as a basis for settlement. When the necessary finding is made under the provisions of H. R. 1095, the parties are required to submit the dispute to a board of arbitration. If either party rejects the decision of the board, the Government is authorized to seize the plant, mine, or facility. A rejection by the employees must be ratified by a majority of the employees in an election. H. R. 34 allows the parties thirty days, after the Presidential finding and order, to settle the dispute by mediation, conciliation, or voluntary arbitration. If those procedures fail the President must, before the expiration of fifteen additional days, direct the parties to submit their dispute to an arbitration board.[53] The labor court proposal would require the parties to submit their dispute to a three-judge district labor court.

3. *Duties and Penalties.* Under the provisions of H. R. 268 the parties in any dispute covered by the bill must refrain from engaging in a strike or lockout; they are also required to accept the recommendation of the fact-finding commission as a basis for the settlement of the dispute. Failure to observe these provisions will cause an employer or a labor organization to lose all rights under any federal laws regulating labor relations and subject them to a fine in an amount to be determined

[51] Note 31, *supra.*

[52] The proposals discussed in this subsection are H. R. 34, H. R. 268, H. R. 1095, and the labor court system advocated by Senator Ferguson.

[53] H. R. 34 is the only proposal which attempts to give special consideration to employees who have been deprived of the right to strike. §7(c) requires the board of arbitration to consider their special status in determining the award and provides that employees subject to the Act ". . . ought to have, in relation to others not so situated, at least as favorable a status in the matter of the terms and conditions of their employment."

by a court. An employee who goes on strike would lose his status as an employee under the National Labor Relations Act, and even if rehired would lose all seniority rights. H. R. 1095 provides for seizure of the plant, mine, or facility if either party refuses to submit the case to arbitration, fails to maintain the status quo while the board is reaching a decision, or refuses to accept the award of the board. Possession of the plant, mine or facility by the Government may not be retained in any case for more than one year, and the property must be returned at the end of any sixty-day period of non-profitable operation. If the seizure has been caused by the actions of the employees, they would lose their status as employees under the National Labor Relations Act after ninety days of Government possession; if it has not been caused by the actions of the employees, the Government would retain all operating profit during the period of seizure. When the President makes the necessary finding under H. R. 34, he also issues an order requiring the parties to maintain the status quo. Such order may be enforced by appropriate process issued by a district court of the United States on the petition of the Attorney General. Any representative of labor or management who defies the verdict of a labor court would be prohibited from reappearing before the court; unions or employers refusing to abide by the labor court's decrees would be subject to a fine.

With the exception of those proposals which rely on compulsory arbitration or on the outright denial of the right to strike (as in H. R. 787), the bills which have been discussed would make but two substantial changes in the machinery and procedures now being used to minimize mass work stoppages resulting from the failure to settle labor contract negotiation disputes by collective bargaining.[54] The first would place the mediation and conciliation functions in a new independent agency; the second would implement the mediation and fact-finding procedures by imposing a waiting period before the parties could engage in a strike or lockout.

The provisions for the establishment of a Labor-Management Advisory Committee and a panel of impartial arbitrators are not as comprehensive on these points as the recommendations of the National Labor-Management Conference.[55] Pursuant to those recommendations, a Labor-Management Advisory Committee, appointed by the Secretary of Labor from nominations submitted by labor and management groups, was established and has been meeting with the Director of Conciliation to advise and actively participate in all major policy processes in the Conciliation Service. In addition, a Technical Advisory Committee has been established, composed of appointees nominated by labor and management, to advise on problems

[54] Any matters within the jurisdiction of the Railway Labor Act would be exempt from the provisions of H. R. 301, H. R. 4908, the Case bill, and S. 73; they would be exempt from the mediation, conciliation, and arbitration features of S. 55, H. R. 725, and S. 404, but not from the other features of those bills. They would not be exempt from the provisions of H. R. 34, the labor court proposal, H. R. 268, H. R. 1095, or H. R. 787.

[55] D. L. S. Bull. No. 77, cited *supra*, note 46, at 47-49.

relating to wage incentives, job evaluations, time studies, and similar technical matters.

Other steps which have been taken to strengthen the Conciliation Service and which are not set forth in any of the proposed bills include the establishment of regional advisory committees to advise with the regional directors of the Conciliation Service and to pass upon the competency and impartiality of the panel of arbitrators maintained in each region; the establishment of a panel of twenty-six nationally known experts on labor relations to act as special conciliators to be assigned to disputes when their special background qualifies them to handle a particular case; and the establishment, on an experimental basis, of a labor-management assembly consisting of outstanding individuals representing labor and management to help promote good labor relations in their local areas.

THE SETTLEMENT OF CONTRACT NEGOTIATION DISPUTES: A BUSINESS VIEWPOINT

BERNARD H. FITZPATRICK*

The search for some formula for the settlement of labor disputes has, of late, occupied the public mind to too great an extent. This is singularly unfortunate because it diverts the public mind from its proper path—the search for sound principles of union organization. The plain truth of the matter is that we are unable to formulate any really rational principles for the settlement of labor disputes because we have no really rational and consistent notions of what labor unions are and what they are supposed to accomplish. Since we have no adequate notions on these subjects, we cannot proceed to examine scientifically the next basic question, "What powers and privileges do labor unions need to accomplish their proper purposes?" And if we are not prepared to answer that question we cannot answer its sequel, "What powers and privileges should be denied to labor unions on the ground that they are non-functional and hence arbitrary?"

Basically, national success in the settlement of labor disputes depends not on such devices as "better mediation machinery," "labor courts" of vague jurisdiction, "cooling-off periods," nor even on those sound but ill-defined notions, "collective bargaining" and "proper human relations"; it depends on the discovery and employment of rational principles for the conduct of parties to labor negotiations. We do not have such principles.

In the absence of accepted principles which at least delineate the major functions and, hence, the powers of unions, talking about settlement machinery is roughly comparable to taking aspirin to relieve recurrent headaches. True, the aspirin may relieve some of the pain, but it will never cure faulty vision, which may well be the cause of the headaches. Moreover, in the limited understanding of the writer, aspirin, taken long enough and in large enough doses, will produce organic damage in the human body; and we may well wonder, listening to recent election returns and to the wilder suggestions for modification of our labor laws, whether we are not now suffering from overdoses of "dispute settlement" administered to the body politic in the last dozen years.

Therefore, in order to avoid a mere treatise on "aspirin," which will never set the body politic back on its feet, this paper will be devoted first to a discussion of the

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"faulty vision" (and it is indeed faulty) which underlies the illness; it will treat that which is substantive before treating the mere machinery of settlement. The application of the foregoing observations to the labor field may seem far-fetched. Let us, however, try to apply them concretely.

The general public and also strike statisticians have a very naive way of looking at the facts of a labor dispute. The general public's concept of a dispute is limited to the idea that the union is demanding certain rates of pay and the employer is insisting on certain lower rates of pay. Strike statisticians will limit their report of that situation by calling it a "wage dispute." Let us look at two historic strikes, each of which involved an apparently simple "wage dispute": the April, 1946, coal strike and the basic steel strike of 1946. Have we any principles which will permit us to say whether Lewis was right in closing all the coal mines, or whether Murray was right in closing down the steel mills, and other enterprises, in support of their respective aims?

We have no such principles; we have never fully rationalized the subject. But are there not striking differences between the situations of Lewis and Murray which require recognition before any sound judgment can be passed? Most assuredly there are. Taking the case of Lewis first, let us attempt to understand his position by examining some strange conduct of his in connection with portal-to-portal pay.

In the operation of a coal mine it is necessary for the miners to report at the pithead or portal of the mine, pick up their lamps, tools and explosives and travel down the shaft on cars to the exposed end of the vein of coal on which they are working, called the "working face." In some mines this travel is very short, because the end of the vein is near the surface. But as coal is blasted out, the working face is pushed deeper and deeper into the mine, and in some of the older mines it takes more than two hours to travel back and forth between the face and the portal.

Now, until the defunct War Labor Board made its first "travel time" award,[1] coal miners were never paid for this travel time. Their paid time started not when they reported at the pithead but when they reached the working face, and their paid time stopped when they left the working face on the return mantrip to the pithead, where they checked in their equipment before going home.

Is it not strange that strongly unionized employees should put in as much as two hours every day on company property and under company orders without getting paid for it? And is it not stranger still that when the Wage and Hour Administrator wanted to rule that travel time was working time and had to be counted toward the forty-hour week for overtime purposes, the United Mine Workers protested vehemently, insisted that travel time was *not* working time, and refused to let its members collect back pay for overtime?[2]

To find the explanation for this strange union conduct we shall have to examine

[1] Illinois Coal Operators Ass'n., 11 WAR LAB. REP. 687 (1943).

[2] See the dissenting opinion of Mr. Justice Jackson in Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, 325 U. S. 161, 170 (1944), esp. the note at 183-187.

this portal-to-portal issue a little further. After the "wage freeze" was clamped on in 1942, Mr. Lewis needed an argument to secure a wage increase. He seized upon this unpaid travel time, went to the War Labor Board, and argued, "My men are not getting paid for travel time. You must increase their wages by taking them off the 'face-to-face' pay basis and putting them on the 'portal-to-portal' pay basis." The War Labor Board ruled that miners were entitled to be paid for travel time.

But the trick in the travel-time award was this: under the award, employers were not to compute the time of each individual miner, nor, indeed, the travel time of each individual mine, and pay the employees according to the actual travel time. Oh, no! They were to compute the travel time in all *competing* mines, strike an average travel time among all those mines, and pay each employee that average travel-time allowance. So that a miner on a new vein where the travel time is ten minutes may get a travel allowance of forty-five minutes, but a miner in old diggings, where the working face is in the next county and there are two hours of travel in and out, still gets only forty-five minutes travel time.

Now it can be seen what Mr. Lewis is doing. He is trying to produce a parity of labor cost among all competing mines. Why? Because coal is what we lawyers call a fungible commodity, a commodity replaceable in kind. One ton of a given grade is about as good as any other ton of the same grade, and any differential in the selling price, however small, will sell the product of one mine over the product of another. The labor cost in coal mining is directly and powerfully related to the selling price, so that Lewis must, as nearly as he can, keep the labor cost equal among all competing mines, to avoid wrecking the price structure of the industry. If the price structure were wrecked, the colliery companies would have to compete by cutting wage rates—and that would be the end of the United Mine Workers.

It is obvious that such a union scheme absolutely prohibits any freedom of choice on the part of employees. Monopoly is the keystone of its operation. All of the competing mines must be subject to the standards established by the United Mine Workers, or the whole structure will fall apart. If the employees of the *A* mine want a different union with different standards they cannot be permitted to have it. The United Mine Workers must keep their coal off the market—by mass picketing, by boycotting, by any means at their disposal. And the record in the famous *Coronado* case[3] will show that in order to keep scab-dug coal out of the Central Competitive Field some fairly rough means were resorted to. Almost any coal-mine labor case will show that the United Mine Workers are very much less interested in the organization of employees as such than in keeping the coal dug in non-conforming mines off the market.

This being the case, the United Mine Workers must, of necessity, in any dispute with the mine owners, strike the entire competing section of the industry (which means the commercial, but not necessarily the captive mines). In no way other

[3] Coronado Coal Co. v. United Mine Workers of America, 268 U. S. 295 (1925).

than by unitary action can the competitive parity which lies at the basis of the system be maintained. Hence there is at least a reason, if not a justification, for an industry-wide shutdown of the commercial mines.

Now let us contrast the situation of the United Steelworkers, who shut down the basic steel industry (and such unrelated industries as the production of paper milk containers). The Steelworkers exhibit no nice regard for maintaining competitive parity between one producer and another. There was no timorousness in the Steelworkers about filing portal-to-portal pay suits, no effort to spread the burden of travel time equally among competitors.

The reasons for this lack of concern over the competitive situation in the steel industry are readily apparent. In the first place, production-engineering differences between competitors make parity unattainable. One producer manufacturing sheet or plate on a continuous strip mill can turn out his product at a paltry fraction of the labor cost of a competing company rolling by older methods. In the second place, competitive parity, even if attainable, is of little consequence to the union or to the companies because the products do not come into such violent price competition. Competition in steel is not the penny-matching competition found in coal; it is a matter involving specification, patented products and processes, salesmanship and service.

Since there is no vital industry-wide relationship to be maintained by the Steelworkers, why in the 1946 basic steel strike did they choose to shut down the whole industry? The answer is, apparently, that because there is no vital industry-wide relationship, the Steelworkers Union is an organization which tends to fly apart—to segmentize into CIO, AFL and independent and non-union shops; consequently its leadership, to "glue" it together, is alert to find industry-wide issues. The first genuine industry-wide (practically nation-wide) issue was provided by the cutback of production at the end of the war, and the leadership grasped that issue to give the constituent shops of the union an identity of interest, however arbitrary, and thus conquer the tendency to segmentize which exists because there is no natural industry-wide relationship binding together the labor of the steel industry.

Was Mr. Murray justified in shutting down all the steel mills? Certainly Mr. Lewis had a much more tenable justification for shutting down all the coal mines.

The point here is not to justify nor to condemn the acts of either Lewis or Murray. It is to point out that, while the unions involved have radically different functions to perform, the law gives exactly the same powers to both unions. The result is that one or both will have some powers which are non-functional and hence arbitrary. The mind of man cannot devise satisfactory settlements of disputes arising out of the use of arbitrary powers.

Apply this to concrete issues. If Lewis obtains a wage increase of, say, eighteen cents per ton at one mine, there is a good reason why other mines should grant the same increase. But when Murray obtains an increase of eighteen cents per hour

at one mill, there is no compelling reason why other mills should pay a like increase. Why should not other mills pay ten cents, or thirty cents?

Take another issue. Lewis can demand a union shop on the ground that, since there is an industry-wide problem to be solved, the employees of each mine are bound by an interest which transcends their relationship with their individual employer; at the same time, when he gets a union shop he acquires, by the very nature of his undertaking, the responsibility of treating all employers and employees alike. But Murray undertakes to do no more than deal with the relationship between the employees of one mill and their employer, and if he is granted a union shop he acquires no responsibility whatever.

The first step to be taken to provide satisfactory methods of dispute settlement must be taken by Congress. That step does not consist in the passage of restrictive legislation to curb the evils which have been impressed upon the public mind by experience; it consists rather in a re-examination of the fundamentals of unionism.

At one time or another in our labor history, popular and legal approval have been given to three distinct and mutually inconsistent objects of unionism:

1. The standardization of journeymen's pay rates and other working conditions in a local area (craft unionism);
2. The removal of wage-rate differentials as an identifiable factor in the pricing of competitive goods (old-line industrial unionism);
3. The achieving of maximum benefits for employees in relation to their own employer without special reference to the remainder of the craft or to the employer's competitors (elective unionism).

Craft unionism is ideally a monopoly of the labor market; old-line industrial unionism is ideally a monopoly of employers whose goods are competing; elective unionism, which is the creature of the Wagner Act,[4] is, ideally, anti-monopolistic, since it depends on the free choice of employees in different bargaining units. It does not take any great acumen to see that such institutions are mutually contradictory in principle and that if the law recognizes and supports all three in identical fields conflict must result. Moreover, all three institutions will be unstable and labor leaders will, consequently, be driven to extreme measures to maintain the integrity of their respective organizations, as demonstrated by Mr. Murray's basic steel strike.

The attainment of differing objectives requires structurally different forms of organization. If you desire to attain the objective of craft unionism you must secure closed shops and industry-wide bargaining; you must prohibit dual unionism, working non-union, and working below scale; you must endeavor to prohibit non-union men from working within your territorial and trade jurisdiction; you must always act as "the Craft," a principal, and never permit your organization to be reduced to a mere bargaining agent. If you desire to attain the objective of old-line industrial unionism, you should secure union shops, keep scab goods from competing

[4] 49 STAT. 449 (1935), 29 U. S. C. §151 *et seq.* (1940).

with union goods, endeavor to maintain parity of labor costs whether certain groups of employees like it or not, and always act as "the Industry," never permitting your organization to be reduced to the status of a mere bargaining agent. If you wish to attain the objectives of elective unionism, you need not worry about closed shops or industry-wide bargaining, and you can safely act as agent for the shop which is your concern of the moment. The greater disparity (on the high side) you achieve over other comparable bargaining units, the better off you will be; and your one major concern will be to please your constituents (unless, of course, you can control them by maintenance-of-membership requirements).

Our friends who work at the physical sciences draw pictures to illustrate and differentiate the phenomena which they observe. While it is a bit more difficult to treat sociological phenomena than, for instance, atomic phenomena in this way, the drawings depicting the ideas of craft unionism (Fig. I), old-line industrial unionism (Fig. II), and elective unionism (Fig. III), will impress upon the reader the radical differences among these institutions.

Such differing institutions require different organic law. The primary move toward improving the national record in the settlement of disputes must be taken by Congress, which, after adequate study, should tell us which of the three objectives are in accord with public policy, and which policy is to be followed in which field of endeavor. Is the craft union principle better in the building trades? Then apply the anti-trust exemption[5] and the anti-injunction acts to that field and get rid of the contradictory Wagner Act in that field. Is the old-line industrial union better in the garment trades and the coal mines? Then abolish the mirage of freedom created by the Wagner Act and bolster in that field the old-line industrial union principle by such enactments as the Clayton Act[6] and the Norris-LaGuardia Act.[7] Is the principle of elective unionism better in those fields of commerce and manufacture where craft standards are impractical and meaningless and labor-cost parity unattainable? Then, in those fields, abolish the closed shop, facilitate the ouster of non-representative unions by their electorates, and reduce the union to the status of a mere bargaining agent with no policies of its own, but those only which each shop unit has desired.

To the foregoing extent at least must the law undertake the settlement of labor disputes, enforcing its decrees by normal legal procedures.

We now turn to a discussion of the mechanics of dispute settlement, what has previously been called the "aspirin." The underlying institution of the free-enterprise system is the mutually advantageous contract. A contract is a meeting of the minds of parties on the respective undertakings of each. If minds have not met, they may be assisted to come to a meeting but it is impossible to make them meet.

[5] 38 STAT. 731 (1914), 15 U. S. C. §17 (1940).
[6] 38 STAT. 738 (1914), 29 U. S. C. §52 (1940), limiting the use of injunctions in labor disputes.
[7] 49 STAT. 70 (1932), 29 U. S. C. §101 *et seq.* (1940).

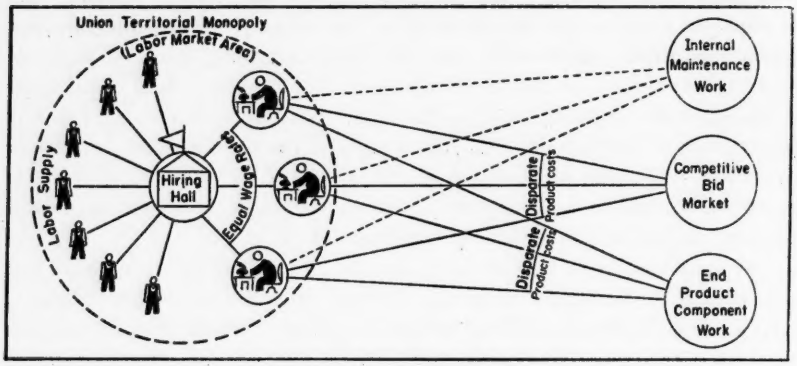

Figure I. IDEA OF CRAFT UNION

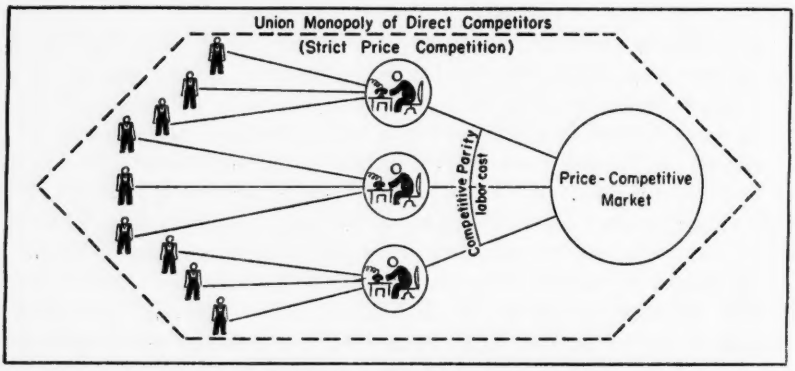

Figure II. IDEA OF OLD-LINE INDUSTRIAL UNION

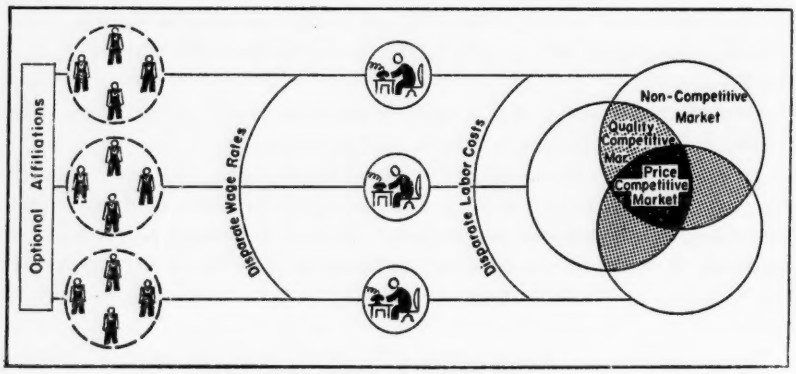

Figure III IDEA OF ELECTIVE UNION

And it is as simple as that. No scheme, whether it be denominated "labor courts" or "compulsory arbitration" or called by any other name, which prescribes the conditions under which men must engage in mutual enterprise is consonant with the free-enterprise system.

The argument for labor courts and for compulsory arbitration thus has a fatal handicap. But this is not the only handicap, for experience in War Labor Board days has demonstrated that even when backed by the powerful moral suasion of the war the fiats of the board did not stop strikes and were, in many cases, the active producing cause of strikes.

The word "fiats" is used advisedly. It is an error to confound the notion of voluntary arbitration, wherein the parties have the ability to define the subject-matter submitted to arbitration so that the award or decision may be kept within tolerable limits, with the misnamed "compulsory arbitration" (it should be called "particularized labor legislation by random legislators") wherein the subject matter is unlimited and the manner in which the business interest and the labor interest are to be administered is determined by a person having no responsibility either to capital or to labor.

It is likewise an error to assume that "labor courts" will perform a judicial function. Their function, too, will be legislative because there are no standards within which they can be confined as judges are confined. And even if it were possible to create standards, which it is not, it would be undesirable to create them, because standards in this field paralyze progress and tend affirmatively to create labor strife by rendering inflexible that which should be flexible—the ability of capital and labor to adjust themselves rapidly to changing conditions.

Finally, compulsory arbitration and labor courts would interfere with our productivity. A labor court may dictate wages, but it can never make an employee cooperative in production; it may prescribe hours, but it can never make employees render service with a smile. Our standard of living is high not because we have greater natural resources; other nations have more than we. It is high because we, more than any other nation, have recognized that there is a spiritual force in man—his free will—which if left unfettered is potent to overcome all obstacles. Our production system is based upon this force: we must win the co-operation of men, not compel it. To the extent to which a system of compulsion supplants a system of volition we lose this force, and the result will be individual bankruptcy and national setback.

There are, in the case of certain utilities and certain basic industries, some apparently powerful arguments for abolishing collective bargaining and substituting compulsory arbitration. (It may be noted, in passing, that this is precisely what would happen: compulsory arbitration absolutely destroys collective bargaining; it can never be a "terminal point" in collective bargaining.) However powerful this argument of the "common good" may appear, it is always the short-term "com-

mon good" which is meant, never the long-range "common good." In such industries other solutions than compulsory arbitration must be sought. For example, if the trouble is monopoly, break down the monopoly; if a natural monopoly is involved, consider seizure and the provision of substitute service.

There is one idea which the writer advances very diffidently as a substitute for compulsory arbitration in the utility field. This is based upon the predicate that the employees and the management in that field have the duty of serving the public. More specifically, they have the obligation to arrive at mutually satisfactory terms of employment in order to serve the public. If they default in their obligation, the consuming public is damaged. Let the consuming public, therefore, recoup its damages from the parties who have failed to make the necessary agreement. Since there is no way of apportioning the damage as between employer and employee, let them both contribute in equal amounts. Perhaps the threat of such loss following upon a strike would furnish an adequate incentive for agreement, and the threat could be made a certainty by formalization of the procedure. Procedural provisions could be devised which would prevent the employees from visiting their share of the damages upon the employer by the simple process of increasing their demands. While the impossibility of apportioning the damages makes one pause, it may be remarked that the idea has certain points of similarity with the treatment of the multiple-employer problem under the workmen's compensation laws and also with the admiralty collision rules.

Another idea, again advanced very diffidently, involves a technique which avoids the vice of compulsory arbitration. This idea might be called "supervised bargaining," and is based upon an extension of the notion of section 8(5) of the Wagner Act,[8] which imposes upon the employer the duty of bargaining in good faith. As it stands in the Wagner Act the provision is one-sided and more or less futile as an instrument of industrial peace because it attempts to answer the somewhat academic question, "What unlawful conduct of the employer several months ago stood in the way of agreement?" If, however, the obligation were made bilateral by including the union, and if the proceeding were transferred from the NLRB to a court with chancery powers, and if the investigation were directed at the present conduct of the parties rather than at their past acts, the proceeding might become an instrument of industrial peace. The bargaining process is often stymied by unlawful demands or by evasions or by misconstruction of words. A court could determine what demands are unlawful, what conduct is evasive, and it could put binding constructions on words. The writer recalls a case wherein a union objected to an employer's job descriptions but would neither advance descriptions of its own nor point out wherein the employer's descriptions were in error, nor even inspect the plant to determine what the correct descriptions were. Such conduct could be readily corrected by a judicial authority operating "on the spot" with adequate powers not

[8] 49 STAT. 452 (1935), 29 U. S. C. §158(5) (1940).

to compel agreement but to eliminate misunderstanding, lack of good faith, and illegality. If, in addition, at the conclusion of its proceedings it were authorized, in its discretion, to submit the final offer of the employer directly to the employees, some strife might be prevented. A procedure of "supervised bargaining" may hold some promise.

The "cooling-off" period has gained some popular favor. Most of the men in labor and in industry who deal directly with industrial relations believe this device to be more an illusion than a solution. This is so because the moment a cooling-off period is imposed upon the parties it becomes a strategy factor in negotiation, a card to be played at the proper time by one or the other of the parties. This is true whether the period precedes or follows the breakdown of negotiations. If a party knows that a cooling-off period will follow the breakdown, he will not concede as much prior to the breakdown, in order that he may sound out the temper of his opposition; and this type of dealing will cause more breakdowns, and probably more strikes. The probable potency of the cooling-off period as a strike preventive is so small that its enactment into law is unjustified.

One constructive piece of legislation that could be attempted, however, is a requirement that parties notify the United States Conciliation Service either of the opening of negotiations or of the breakdown thereof. There is a feeling among some labor relations men that an appeal to the Conciliation Service is a sign of weakness which might prejudice their bargaining positions. The statutory requirement that such notice be given would cure this reluctance to call in a third party.

What to do about the Conciliation Service is today a mooted question. The fact that the Department of Labor is by statute a partisan of labor creates a good deal of doubt as to its impartiality in the administration of the Service, and the actual experience of many management men with conciliation commissioners, particularly on such issues as union security, has tended to confirm the suspicion that, either in its method of selecting personnel or in its method of training, the pro-labor bias has played some part. Even if the Labor Department were not a statutory partisan, there is considerable doubt of the wisdom of leaving the Conciliation Service subject to one of the political departments of the Government where it may be used as an instrument of Administration policy. The proper disposition of the Service is probably to constitute it an independent agency. The idea of having the Service administered by a governing committee composed of labor and of management representatives (no "public" representatives) is worth exploring. The function of the governing committee should be limited so that it would not itself enter into the settlement of disputes but would merely select and direct the personnel of the Service.

The idea of a "mediation board," meaning a body vested with the function of direct and active participation in the settlement of labor disputes, has some currency today. Such an institution would not only be less efficient than the system of media-

tion and conciliation by individual commissioners, but it would be fraught with danger to the parties and to the public. The acts of such a board would, like those of the ill-conceived fact-finding commissions, tend to start "patterns" which would create and intensify disputes elsewhere in our economy.

Legislation can never furnish a panacea for industrial ills, but it is a mistake to think that nothing can be accomplished by legislation. The laboratory of legal science is a hard laboratory; but if we persist in working out our experiment in freedom, keeping our substance away from the acids of foreign ideologies, there is no reason why we cannot ultimately achieve substantial industrial justice and a fair measure of industrial peace.

THE SETTLEMENT OF CONTRACT NEGOTIATION DISPUTES: A LABOR VIEWPOINT

BORIS SHISHKIN*

It has become customary to regard the year and a half immediately following V-J Day as marking a breakdown in industrial relations in the United States. It is true that during this period an unprecedented number of workers were involved in work stoppages due to industrial disputes. Yet most of these work stoppages were brief and most of them occurred within a short five-month period extending from January through May of 1946. Nor was the record of strikes in this troublesome year in our industrial relations as calamitous as is generally believed. For the entire year of 1946 the monthly average of man-hours lost due to strikes was only 1.5 per cent of the total man-hours worked. In the last seven months of 1946 the time lost on account of strikes amounted to only one-half of one per cent of the total time worked.

Since April, 1946, the trend in strikes has been downward. But even before that, relatively few strikes accounted for most of the idleness due to all strikes. To illustrate, during the one-year period following V-J Day, three strikes accounted for 45.5 per cent of all idleness due to strikes; seven strikes accounted for 60.8 per cent of the total man-days lost; and forty-two disputes were responsible for over 70 per cent of the total idleness.[1]

These figures give some measure of perspective to the postwar strike wave, but they do not show what caused it. According to figures compiled by the Department of Labor, more than 80 per cent of the total man-days of idleness in postwar, strikes resulted from disputes over a single issue: wages.[2] It is clear that the postwar industrial unrest was not the result of a breakdown in collective bargaining procedures, was not provoked by the deficiencies of the Wagner Act, and had nothing to do with disputes over the union shop or other forms of union security. Seldom, if ever, in our history has a single force behind such a wave of unrest been so clearly revealed. That powerful economic force, the compelling cause of these disputes, was inflation. The overwhelming majority of postwar strikes were due to a sharp rise in the cost of living in the face of declining earnings of the workers.

As a general rule, before the end of the war, wartime wage controls had per-

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[1] *Postwar Work Stoppages Caused by Labor-Management Disputes,* 63 MO. LAB. REV. 872 (1946); *Labor-Management Disputes,* 64 MO. LAB. REV. 262 (1947).

[2] 63 MO. LAB. REV. 886 (1946).

mitted only a 15 per cent increase in wage rates over those prevailing in January, 1941. Extensive overtime work, night-shift premiums, and assignment to higher-paying wartime jobs were mainly responsible for the wartime increase in earnings. Beginning in 1944, the upward trend in earnings was reversed. With the end of the war, most overtime schedules were eliminated and in increasing numbers workers were forced to transfer to lower-paying jobs, bringing about a sharp curtailment in wage income. During that period there was no way in which the average worker could balance his family budget: the price of groceries continued to rise; expenditures necessary to maintain a home could not be cut—there was no place to move; and so the worker insistently demanded higher pay. In most cases satisfactory agreements were reached through negotiation. Where workers did go out on strike, they almost invariably struck for higher wages.

Evidence of the decline in total wage compensation since 1944 is conclusive. According to the United States Department of Commerce, total wages and salaries declined from $112.8 billion in 1944 to $111.4 billion in 1945 and to $106.6 billion in 1946.[3] During this period prices rose to new heights and the buying power of these wages was sharply cut. Between 1944 and 1946 real wages and salaries, measured in 1944 dollars, dropped from nearly $113 billion to slightly over $90 billion. In the meantime the upward march of the cost of living continued. Between December, 1945, and December, 1946, the consumer price index rose 18 per cent, while wholesale prices advanced 31 per cent.[4] The growing disparity between the workers' wage income and their living costs had increasingly cut into their savings. Measured in current dollars, net savings of individuals fell from $39 billion in 1944 to $17.5 billion in 1946. Small wonder that lower-paid workers were forced to go into debt in order to make ends meet, as shown by the recent Bureau of Agricultural Economics-Federal Reserve Board study,[5] and that installment credit, despite remaining restrictions, was breaking all records.

Even under the severe strain of such far-reaching distortions, most postwar wage disputes were being successfully settled by direct negotiations between labor and management. The great majority of AFL affiliates in a wide range of industries and trades provided an impressive demonstration that wage settlements can be achieved peacefully without a sacrifice of the resulting wage standards whenever management is responsive to the need of reaching a fair settlement. But an objective appraisal of wage disputes since the end of the war shows conclusively that the major share of responsibility for work stoppages during this time falls neither on labor nor on management, but on the intervention of government in the process of wage determination. There is no denying that the 18½-cent formula set an artificial mark in the minds of millions of workers to whom it was not intended to apply.

[3] *National Income and National Product*, Survey of Current Business, Feb., 1947, p. 8 (Table 4).
[4] *Prices and Cost of Living*, 64 MO. LAB. REV. 278, 289 (1947).
[5] 32 FED. RES. BULL. 719 (1946).

Nor can it be successfully disputed that in many key sectors of the price structure the government, through the use of its price-control powers, helped to translate wage increases into price increases out of all proportion to the actual wage costs.

The greatest injury to the economy was inflicted in this series of semi-political decisions of the government when it made its wage-price determination in the steel industry,[6] an incident which illustrates the ineptitude of such government intervention. On the initiative of John W. Snyder, then Director of War Mobilization and Reconversion, the government approved the 18½-cent across-the-board increase in steel wages on the condition that the industry, to be able to pay the wage increase, would be accorded "price relief" in the form of an increase in the price ceilings of more than $5.00 per ton. This was done in response to the plea of the major steel manufacturers that wages could not be raised without increasing prices proportionately. The United States Steel Corporation, the chief pleader in the case, has since supplied figures showing that between 1945 and the third quarter of 1946 (with the wage increase put into effect in the spring of 1946) the average wage cost per ton dropped about $1.40, while net profits per ton almost doubled. In other words, at the level of operations which was fully assured for this period, United States Steel could have paid the wage increase and at the same time reduced its steel prices, instead of effecting the large and highly inflationary price increase which it had been so gratuitously allowed.[7]

This is not to say that some of the small steel fabricators, subjected to the uniform formula, fared equally well or even escaped a tight squeeze in some instances. The point is that the use of the wage-price formulas in this and other situations made a rational and non-political settlement of wage disputes well-nigh impossible. This is not the place to discuss the wage-price problem involved in the major industrial disputes of the last year and a half. Which firms or industries could have raised wages without increasing prices is now a moot question. The next recession will afford many managements and more workers ample leisure to ponder it. In the meantime the evidence is conclusive that prices went up most, as in food, where wages had been raised the least.

Further sharp increases in the price structure and in the cost of living appear unlikely. On the contrary, the far-reaching and still growing imbalances in our economy point to drastic cuts in production and prices in a number of major lines in the very near future. There is nothing in our current economic policies to provide a hope for sustained employment and production, unaffected by a recession. The important immediate question of policy is not how to prevent work stoppages arising from the workers' demands for higher wages, but how to avert widespread unemployment and a general breakdown in the established wage standards.

[6] *Labor-Management Disputes*, 62 MO. LAB. REV. 425, 426 (1946).

[7] Derived from data presented in 44th and 45th Annual Reports of the United States Steel Corporation: MOODY'S INDUSTRIALS (1946) and reports filed with Securities and Exchange Commission.

It must be recognized, of course, that a downward price readjustment accompanied by an intensified pressure on labor costs is bound to lead to attempts at wage-cutting. This development will result in acute controversies between labor and management, but it need not develop into widespread strikes.

How can work stoppages be avoided in future wage disputes? The basic solution no doubt lies in the sphere of direct wage negotiations between unions and employers. In the past fifteen years unprecedented progress has been made by unions in increasing reliance on facts in negotiating wages. The American Federation of Labor alone reports that more than forty of its national and international unions have established research departments, in addition to the wage negotiation services provided directly by the Federation.

Under competitive conditions a firm cannot be expected to make its detailed cost data available to the public. But a union-management agreement is a private contract. In the formulation of that contract two elements must be present: (1) informed understanding by management of the problems surrounding the wage compensation of the workers as seen by the workers themselves and as interpreted by their chosen representatives; and (2) understanding by the workers' representatives of the management problems involved in the wage settlement. This involves the exercise of a mutual responsibility by both parties toward each other. Management usually tends to regard wage payments solely as a cost of production. In this, management representatives often overlook the fact that what really counts is the unit wage cost. Years of experience have proved that relatively higher wage *rates* are likely to yield better productivity and lower unit wage costs. The adequacy of wages as income cannot be disregarded by the management negotiators. Adequate wage income has a vital bearing on sustained efficiency of workers. It helps sustain peaceful labor-management relations. Recognition of the worker's income problem by management is plainly good business.

Workers, on the other hand, tend to consider wage income as the most important factor to them in making a wage settlement. Unless the union negotiating committee is given access to the cost data which are controlling in wage negotiations they cannot understand the true nature of the management problem; and without understanding there can be no responsibility. The sense of responsibility of workers toward the welfare of the enterprise cannot be developed so long as the union is denied access to basic information regarding the operation of the enterprise.

Access by qualified union representatives to the income and cost data of the enterprise does not constitute and does not entail an infringement upon the management prerogative. In many widely different sections of industry and trade, company "books" have long been open to union negotiating committees without any untoward effects on labor-management relations and without any disclosure of the basic facts to competitors. Where interchange of income and cost information has

been free, union-management co-operation has proved to be most effective and peaceful relations have been most enduring. Such interchange of information is indispensable to fully effective collective bargaining based on a functional community of interests between labor and management. When direct wage negotiations fail to produce an agreement, conciliation and mediation are the first steps in averting a deadlock in the dispute. The United States Conciliation Service has established an impressive record of bringing about final settlements in difficult wage controversies. Steps have recently been taken to equip the commissioners of conciliation with ready and current information regarding the prevailing wage levels and to keep them abreast with the current practice of wage determination. Employers and unions are both agreed, as shown by the unanimous action of the Labor-Management Conference and the subsequent recommendations of the Labor-Management Advisory Committee, that the personnel and facilities of the Conciliation Service need to be strengthened in this respect and need to be retained within the framework of the Department of Labor.

Some wage disputes will always remain irreconcilable and unresponsive to ordinary mediation. Some strikes over wages are unavoidable. This is especially true of areas where collective bargaining relations are relatively new and collective agreement has not yet become the instrument of lasting confidence which must be at the core of the relationship between labor and management. Agreement of the parties to submit to arbitration should be the final step in the settlement of wage controversies where negotiated agreements have been previously established.

According to a recent Bureau of Labor Statistics study of 1,254 representative collective-bargaining agreements,[8] about three-fourths of the agreements analyzed make individual wage disputes, including those over wage rates and wage classifications, subject to arbitration. In the light and power industry, practically all contracts of the International Brotherhood of Electrical Workers provide for arbitration as the final step in the settlement of disputes, including disputes over wages. In addition to voluntary arbitration, IBEW contracts with public utilities contain no-strike clauses, assuring continuity of operations at all times. In plants covered by the Brotherhood's contracts there have been no work stoppages or interruptions of service in twenty-eight years. In another public utility field, local streetcars and busses, the AFL union maintains a requirement for voluntary arbitration in its national constitution. Voluntary arbitration of wage disputes in the printing trades is long-established and time-honored. In the garment trades, the pottery and chinaware industry, the elevator manufacturing industry, and many others, arbitration is the long-accepted, voluntary, final step in the settlement of wage and other disputes.

The already established procedures for voluntary arbitration may be modified and perfected to meet new and changing conditions. A few months ago, the Labor-

[8] U. S. DEP'T. OF LABOR, BUR. OF LAB. STAT., ARBITRATION PROVISIONS IN UNION AGREEMENTS (BULL. No. 780, 1944).

Management Advisory Committee to the Secretary of Labor recommended the use of special "boards of inquiry," established with the consent of the parties, to serve as a final means for the settlement of wage and other controversies. Utilization of such procedures in the major area of industrial disagreement—the determination of wages—can serve as an adequate safeguard against work interruption in most situations likely to arise in the next two or three years.

The record shows that since V-J Day more than 80 per cent of trouble in industrial relations has been over wages. The great drive for labor laws made in the Eightieth Congress has the prevention of strikes and assurance of industrial peace as its declared objective, yet none of the measures proposed deals with the causes of, nor attempts to devise remedies for, the unrest resulting from the decline in wage income and the unchecked rise in the cost of living. Nor are these measures related to any of the difficult problems of wage negotiation and collective bargaining underlying most postwar labor disputes.

Changes in the National Labor Relations Act, no matter how desirable they may be for other reasons, cannot bring about more peaceful labor relations. Proponents of bills declaring the closed shop illegal may argue their cause with all vehemence and eloquence, but they cannot legitimately claim that their proposals would prevent work stoppages. For, in the first place, disputes over union security have not been a significant cause of postwar strikes. In the second place, the areas of greatest stability and peace in labor-management relations since the end of the war are found in industries such as paper and pulp, women's clothing, hosiery, and printing, where the closed shop is prevalent.

The same is true of the several proposals for compulsory settlement of labor disputes. Compulsion will not end work stoppages unless the compelling power is prepared to march the entire length of the road to totalitarianism. The Commonwealths of Australia and New Zealand have both operated under systems of compulsory arbitration for many years, yet their strike record has not been better, and in recent years it has been far worse, than that of the United States.

The legislative proposals embodying compulsion have taken many forms, including compulsory cooling-off periods, compulsory fact-finding, and compulsory submission of disputes to labor courts. In some bills provisions for compulsory arbitration are carefully camouflaged or limited in scope to make them appear mild and innocuous. Some would limit compulsory arbitration to public utilities and coal mining; others would confine it to disputes affecting the public interest, safety, or health.

No convincing case has been made out in support of compulsory cooling-off periods. In most sizable work stoppages since V-J Day, the parties had negotiated for at least thirty days prior to the walkout. The compulsory cooling-off proposals require an advance strike notice. Experience under the Smith-Connally Act[9] has

[9] 57 STAT. 163 (1943), 2 U. S. C. §251, 50 U. S. C. App. §§309, 1501-1511 (Supp. 1946).

further demonstrated the obvious consequence of such a requirement: the advance strike vote tends to serve as a declaration of war and the "cooling-off" period merely intensifies the determination to strike on the part of the workers concerned.

Compulsory fact-finding boards were set up by the government in several reconversion disputes, as a part of the extended wartime stabilization program. They hardly proved successful. The unwillingness of employers to submit to compulsory fact-finding was even more intense than that of unions. In the end the fact-finding boards' recommendations were either arbitrarily modified by the Director of War Mobilization and Reconversion or by the President, or were put aside in favor of some other method of settlement.

Compulsion, no matter how small its degree, vitiates the voluntary process of collective bargaining. To the extent that any proposal requires a worker to remain at his job it is coercive; to that extent it relies on involuntary servitude, outlawed by the Constitution. The right to strike for a lawful purpose must not be abridged. Abridgment of that right cannot be easily enforced. Government coercion, necessary to force a large number of persons to work against their will, breeds powers repugnant to a free people Coercive and repressive measures, used where just grievances exist, generate bitter resentment and deep-seated hate on the part of the workers, directed against constituted authority. Such compulsory measures would not eliminate the sources of disputes nor resolve them; but they would shift the areas of conflict from the economic to the political scene.[10]

The National Labor Relations Act has provided a procedure for the settlement of disputes over union recognition. Disagreements over the application and interpretation of existing contracts are usually settled somewhere along the line of the grievance procedure, with its customary final resort to arbitration. It is disputes over the terms of new or renewed contracts which present the serious difficulties of settlement. The attitude of the employer toward the newly formed union and toward collective bargaining itself is decisive in the settlement of disputes over new contracts. Equally important is the extent to which experienced and skilled representation is afforded the newly formed union by its parent organization. A new agreement, to be workable, must represent a meeting of the minds of the two parties. It is often decisive to the future of labor-management relations in a plant or shop. It must be a true agreement, for which there is no substitute, no matter how much outside influence may be injected.

Negotiations for the renewal of existing agreements usually begin thirty days prior to the expiration date of the contract. If, as the deadline for the termination of the contract approaches, the parties have still not reached an agreement, several courses of action are open. In many cases, if definite progress has been made towards ironing out the disputes, the parties will agree to continue the existing contract for another thirty days, or for some other period of time, with the usual

[10] See Shishkin, *The Case Against Compulsory Arbitration*, Amer. Federationist, Feb., 1947, p. 18.

proviso that any agreement reached will be retroactive to the expiration date of the old agreement.

If the parties are not making progress toward an agreement the services of a government conciliator are usually requested. The chief government agency in this field is the United States Conciliation Service of the Department of Labor. In addition, a number of states and several cities have developed conciliation and mediation services of their own. In 1946 the United States Conciliation Service averaged more than 1,300 disputes settled each month.[11] Conciliators were instrumental in settling disputes without a work stoppage in 90 per cent of the cases.

Voluntary arbitration as a method for settling labor contract disputes is gaining increasing acceptance among both union and management groups. It is most appropriate where the issues in dispute are matters which lend themselves to impartial factual analysis. Questions of wage increases, changes in piece rates, and changes in hours come in this category.

On the other hand, some issues are not readily adaptable to the arbitration process. This particularly applies to questions of principle such as union recognition, union security, and the establishment of benefit funds. Except within the limits of agreed standards, or with regard to specified details, principles are not arbitrable.

Collective bargaining, supplemented by conciliation, mediation, and arbitration, is the basic "machinery" for maintaining peaceful labor-management relations. This system, developed over a period of many years, has generally proved effective whenever it has not been stymied by unwarranted government intervention and when it has been based on genuine acceptance of the principle of collective bargaining. But this system is not intended to, and does not, guarantee complete and inviolate industrial peace. Complete lack of industrial disputes can be achieved only in a totalitarian autocracy, where voluntary agreement between labor and management will not be tolerated.

Our democratic society does leave room for disputes and even strikes. We should recognize that the strikes which took place at a time of far-reaching government intervention into labor-management relations, as was the case in the spring of 1946, are not characteristic or typical of our free economy. In any event, these abnormal work stoppages did no irreparable damage to our system of enterprise and production. Within a year and a half after the end of the war we were able to supply, out of current production, most of our current needs, fulfill a large portion of the demand accumulated during the years of war, and at the same time ship huge quantities of food, fuel, and clothing to relieve the needs of the devastated countries overseas. No other system of production has ever demonstrated ability to perform such a feat.

This is not to say that there is no room for improvement in our labor-manage-

[11] 64 MO. LAB. REV. 264, 265 (1947).

ment relations. On the contrary, positive steps are needed to strengthen the basic elements of our voluntary system by voluntary means. As seen by labor, these are the specific improvements needed:

(1) Collective bargaining should develop greater reliance on facts and less on horse-trading and table pounding. Labor and management should both be aided by government in securing comprehensive, accurate, and up-to-date information for negotiations. The sources of basic economic data in the Bureau of Labor Statistics have been gravely jeopardized by Congressional slashes of appropriations. Both labor and management need more and better factual material. Better information on wage rates, earnings and hours, productivity, unit costs, the cost of living, and other essential economic factors is indispensable to sound collective-bargaining relations. Labor and management should learn improved methods in the practical and fair use of such statistics, supplemented by information they themselves are able to develop.

(2) Top representatives of management and labor should meet periodically, not to settle disputes but to discuss operating problems, marketing problems, and employment problems of mutual concern. Workers must have the opportunity of developing, through their union, a sense of direct responsibility for the enterprise. Improved efficiency and higher production standards can be achieved through the workers' intelligent understanding of, and constructive day-by-day co-operation in meeting, the questions which the management must resolve and which it usually cannot resolve single-handed. Union-management co-operation can make a major contribution toward better and more efficient operation of the enterprise and at the same time assure more peaceful labor-management relations.

(3) Proper provision should be made for the parties to a dispute to invoke the services of a mediation agency before a work stoppage occurs. In 1946 about two-thirds of all strikes settled by the United States Conciliation Service were already work stoppages at the time a conciliator was invited to participate. The use of conciliation services should be agreed upon in advance and should be the result of a joint request when a direct settlement cannot be reached.

(4) The United States Conciliation Service should be retained in the Department of Labor and its effectiveness strengthened all along the line. It is our primary safeguard against the breakdown of peaceful labor-management relations. Labor-management advisory committees, national and regional, should be given a larger share of responsibility for reviewing the operations and the policies of the service. Adequate funds should be made available to maintain an adequate staff, which should be kept currently informed regarding current developments in the field of labor relations.

(5) Special attention should be given to the development of improved techniques of mediation. Some experimentation has already taken place, utilizing mediators

who specialize in certain types of disputes, mediation panels consisting of more than one mediator, special boards of inquiry established with the voluntary acceptance of both parties, etc. These techniques should not be confined to spectacular cases but should become part of the regular mediation service in all types of disputes.

(6) Voluntary arbitration services should be expanded and improved. There should be periodic consultation between representatives of labor and management regarding the use of voluntary arbitration and other aids, in the light of changing conditions in each industry or trade.

These are practical and simple steps. About some of them much has been said and little has been done. Perhaps one major reason for that inaction is the widespread ignorance on the part of the general public of the methods by which labor-management problems are being successfully solved every day. Wherever possible, the story of their day-to-day work in this field should be told by labor and management jointly. That story should be told not only in printed word, but also in films, radio broadcasts, and joint labor-management workshops demonstrating how workers and employers solve their problems together. More knowledge and better and wider understanding of basic facts will help to assure wider support of sound programs for improved labor-management relations. This is a task which unions and employers must discharge together.

THE PUBLIC INTEREST IN LABOR DISPUTE SETTLEMENT

JESSE FREIDIN*

It is difficult to conceive how, in the long run, the public interest in the settlement of labor disputes can be successfully distinguished from the common interests of labor and management. The welfare of the nation is dependent on the success with which the worker and the employer fulfill their respective functions. No policy, regardless of how it is labeled, can effectively serve the public interest which does not serve the interests of democratic trade unionism on the one hand and the system of private enterprise on the other. Nor can a policy succeed that does not contain within itself respect for the economic and personal liberties of all citizens, regardless of the side of the table at which they sit. Consequently, when, in the language of the policy makers, we speak of the "public interest," we have under discussion not a system of devices designed to protect one autonomous group of the population from attack by two others, equally independent, but a program that must be calculated to promote the interests of both workers and employers, for to one of these categories most citizens belong.

And so this paper will not discuss a program designed to immunize nonparticipants against the consequences of labor disputes. Instead, the discussion will be based on the premise that the public interest will best be served by the formulation and acceptance of a program devised to serve the common aspirations of industry and labor to promote industrial peace without sacrificing basic concepts of economic and personal liberty.

I

I doubt that during the eighteen months following V-J Day there occurred a single major labor dispute that did not end up with editorial demands for amendment of the National Labor Relations Act. The authors of these demands appear to have accepted what seems to be a misconception of that statute. They have assumed some necessary casual relation between the Act's provisions and the inability of a particular company and union to agree on the terms of a collective bargaining contract.[1] There is, of course, no such immediate or direct relationship. The National Labor Relations Act was neither conceived nor enacted, nor could it

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[1] In this regard a recent Gallup poll has revealed some very provocative results. In response to the question, "What is your understanding of what the Wagner Labor Act provides—or is supposed to do?", 19% of those interviewed indicated "that they have at least a general idea of what the Act is, while 12% gave a totally incorrect answer, and 69% said they simply do not know what the Wagner Act is." Washington Post, Jan. 10, 1947, p. 9, col. 5.

have been administered, as a means of resolving disputes over basic contract conditions between organized workers, acting through their duly designated bargaining representative, and their employer. Probably the most explicit negation of any such purpose is to be found in the 1935 report of the Senate Committee on Education and Labor, to whom the pending measure had been referred:

> Prudence forbids any attempt by the government to remove all the causes of labor disputes. Disputes about wages, hours of work and other working conditions should continue to be resolved by the play of competitive forces, so far as the provisions of codes of fair competion are not controlling.[2]

Congressional ambitions at the time were relatively modest. To give "definite legal status to the procedure of collective bargaining" was the limited purpose of the enactment.[3] The record of industrial strife in manufacturing industries during the period preceding 1935, in contrast to the relative peace that had prevailed in the railroad industry consequent upon legislation[4] that had consistently recognized and sought to protect the right of railroad workers to organize and bargain collectively, persuaded Congress that it was feasible to eliminate at least that one issue from the area of contention.

The Wagner Act therefore addresed itself only to the issue of how, peacefully, the parties were to be brought up to the collective bargaining table. From there they were on their own, their disputes to be resolved by the "play of competitive forces."

Success in accomplishing the avowed purpose of the Act, if honest recognition is given to its limited purpose, has been marked, though it was by no means immediate. The best indication of how gradual has been acceptance of the orderly procedures established by the Act to resolve questions of organization and representation is to be found in the tenth annual report of the National Labor Relations Board, which reflects a consistent rise in the ratio of representation cases to unfair labor practice cases. In 1937, for example, unfair labor practices comprised 71 per cent of all cases filed with the Board, as against 29 per cent representation cases. In 1941 the trend toward representation cases started. They constituted 47.4 per cent of the cases filed. In 1945 this figure had jumped to 75 per cent, in sharp contrast to the 19 per cent proportion of 1936.[5]

II

We would consequently be mistaken were we to attribute to the Wagner Act exclusive or major responsibility for the strikes of 1945 and 1946. In fact, it is note-

[2] SEN. REP. No. 573, 74th Cong., 1st Sess. 2 (1935).

[3] Congress had before it at the time data establishing the fact that 74% of all the disputes that had come before the then existing National Labor Relations Board during the second half of 1934 were over the employer's refusal to recognize the employees' right to bargain collectively through their own representatives.

[4] Beginning with the Act of Oct. 1, 1888 (25 STAT. 501) and culminating in the 1934 amendments to the Railway Labor Act (48 STAT. 1185). See 45 U. S. C. §151 *et seq.* (1940).

[5] 10 N. L. R. B. ANN. REP. 2, 3 (1946).

worthy that not one of the major disturbances during those years involved the once popular issue of organization and the right to bargain collectively. The truth of this conclusion is demonstrated in a report of the Bureau of Labor Statistics on 1945 work stoppages.[6] Not a single major dispute in 1945 involved the issue of union recognition with respect to production workers. Only two disputes involved the issue in any form, and both of those related to the still unsettled question of supervisory employees.[6a] Less than 4 per cent of the time lost through strikes, fewer than 14 per cent of the workers involved in strikes, and only 12 per cent of all disputes included controversy over the question of union recognition. To be contrasted with these facts is the data covering the years 1935—1942, when more than 50 per cent of all labor disputes were over that single question.

There is, then, no obvious correlation between the present form of the Wagner Act and the recent strikes in major industries. It is possible to attribute responsibility to the Act only if we are prepared to say that Congress misplaced its confidence when, in adopting the Act, it contemplated that differences over wages, hours and working conditions would be resolved through collective bargaining. Sober reflection as to the sources and causes of the industrial strife since V-J Day, the large proportion of disputes peacefully resolved through negotiation, and the relative inexperience in collective bargaining of the parties to strike cases will indicate that any such conclusion would be premature.

In the first place, attention has been too readily diverted from the normal to the exceptional. Far too little attention has been focused on the successes rather than the failures of collective bargaining. If one were to base a judgment only on news reports of labor relations one would need to conclude that strike is the rule and peaceful agreement the rare exception. The truth, however, is quite the reverse. The dramatic strike rather than the sober agreement may compel the attention of news reporters, but in a deliberate and careful appraisal of national labor policy the success of the process of free and peaceful persuasion must be given honest weight. The fact is that more than 80 per cent of all organized workers have resolved new contract conditions without strikes or other interruptions of production since V-J Day.[7] Nor, in determining whether the character and extent of the disputes that resulted in strikes during 1945-46 are typical of labor relations in normal circumstances, is it possible to overlook the unique problems that had to be faced. Industry and labor had to grapple with wholly novel issues of the severest difficulty, agreement had to be sought in an atmosphere charged with great tension, and in

[6] *Work Stoppages Caused by Labor-Management Disputes in 1945,* B. L. S. Bull. No. 878 (U. S. Dept. Labor 1946). "Major dispute" here means one involving 10,000 or more workers.

[6a] The question whether foremen as a class are entitled to the rights of self-organization, collective bargaining, and other concerted activities assured to employees generally by the National Labor Relations Act was not finally decided until Packard Motor Car Co. v. NLRB, 67 S. Ct. 789 (March 10, 1947). This decision also upheld the power of the board to treat foremen as a class as an "appropriate bargaining unit." [Ed.]

[7] *Ibid.*

many situations these highly challenging problems were approached by companies and unions unskilled in dealing with each other.

Prior to 1935 union organization in mass-production industries was relatively unknown. Organized labor consisted of approximately three million employees concentrated in the mining, construction, transportation, maritime and needle-trades industries. In automobiles, steel, electric equipment, meatpacking, textiles, and other large-scale manufacturing processes, aggressive, independent unions simply did not exist. Nor did they spring full grown from the passage in 1935 of the Wagner Act. Until 1937, when the constitutionality of the Act was finally accepted, there was not much more than a pretense at collective bargaining. Even organizational efforts remained more or less moribund. In 1937 the battle of organization began, with the National Labor Relations Board and the courts for some time thereafter busily occupied in meeting both bona fide and mala fide efforts to avoid the compulsions of the Act. From that time until our entry into the war the major efforts of the unions in the mass-production industries were concentrated more on achieving a representative status in the mills and factories of the country than on trying to negotiate collective-bargaining agreements. This is reflected in the fact that from 1935 to 1942 the issue of union recognition alone accounted for more than half of all labor disputes in the nation.

From 1941 until the end of the war the restrictions of a wartime economy, the imperative needs of uninterrupted production and economic stabilization, and a nearly completely regimented society almost eliminated the opportunity for free collective bargaining. There was little opportunity for labor and industry to gain during the war years any experience in devising joint solutions to mutual problems. The wartime readiness of the government to make decisions deprived both sides of an educative experience. The war did, however, furnish the source of the perplexing problems that had to be faced in the postwar adjustment. The fight over price control had transformed many wage disputes between an employer and a union into price disputes between an industry and the government. At the war's end workers suffered losses in income resulting from the shortened work week, downgrading of employees, shifts of great groups of workers from high- to low-paying industries, the stricter administration of incentive systems; and then came the constant and sharp rise in living costs. For the worker the economic impact of these developments was unquestionably intensified by the emotional release from wartime wage controls. Nor were the employers' problems a great deal easier. In 1945, for the first time in five or six years, cost reassumed its traditional importance. The guaranteed wartime market, ready to consume and pay any price for whatever could be produced, was about to be replaced by a competitive economy in which a producer could without much difficulty find himself priced out of the market.

It surely could not have come as a shocking surprise to those who were familiar

with the sudden growth and development of organization in the mass-production industries that not all companies and unions were able to find their own solutions to all problems. The really gratifying fact is that so many did. There are, however, two noteworthy factors of which not sufficiently frequent mention has been made. One is that violence and lawbreaking in strike conduct was largely nonexistent. Each party recognized and respected the other's right to disagree. In itself this is a development of significance when considered in the sequence of the long and bitter struggle to establish collective bargaining as one of the principles of our democratic society. The other notable fact is the extent of agreement that prevailed in industries in which collective bargaining had attained a measure of maturity—agreement reached without strike or lockout, in the face of the most trying of circumstances, and covering some 80 per cent of all workers who were members of labor unions. Parenthetically, it is of interest to note that in the strikes which did occur the AFL and CIO were about equally involved. That is to say, unions affiliated with the CIO were involved in 40 per cent of the stoppages that occurred in 1945, AFL unions were connected with 37 per cent, and unions affiliated with neither of the two major labor organizations were involved in about 17 per cent.[8]

Three conclusions of ultimate importance emerge from these facts:

(1) The National Labor Relations Act has succeeded in its limited immediate purpose of removing the issue of union recognition from the area of labor-management controversy.

(2) In the peaceful settlement of the vast majority of labor disputes through collective bargaining, even in the difficult immediate postwar year, the Act has also achieved a substantial measure of indirect success.

(3) We have had only a limited collective-bargaining experience in the mass-production industries, where the preponderant majority of workers who participated in strikes are employed, and even that limited experience has been chiefly confined to unique economic circumstances. Where, on the other hand, the parties entered into their 1945 negotiations with a mature experience in dealing with each other, strikes were relatively unknown.[9]

III

Honest and dispassionate consideration of these conclusions ought to remind us of the danger of throwing out the baby with the bath water. For while their acceptance does not preclude efforts to review and improve the national labor policy, there is a real threat that in the heat of present public concern an intemperate or hastily conceived program will be formulated that will have the effect of permanently injuring the processes of free collective bargaining.

[8] *Id.* at 22.

[9] For example, in the apparel industry only 1.7%, in the printing industry 3.7%, and in the construction industry 5.8% of all the workers employed were involved in strikes. In all three industries union organization is extensive. The comparable figure for all manufacturing is 19.6%. (*Id.* Table 4).

It must be realized that the present unbalance of labor's power is not so much due to the inherent nature or strength of labor unions as to the strength of the economic forces now at work, forces that are characteristic of an economy of scarcity—labor shortages and the need for maximized production. The great danger is a refusal to recognize this fact, and a willingness instead to assume that the extent of the power now possessed by the organized worker and the pervasive effects of its exercise are necessary elements of a strong labor movement operating in a normal economy rather than the result of a set of exceptional economic circumstances. Our entire governmental effort is being directed toward a return to a normal economy. It would be illogical to base a reappraisal of our labor policy on the premise, so wholly at odds with this overriding governmental aim, that the emergent forces of the immediate postwar period, predominantly responsible for recent labor unrest, will continue. The objective of our reappraisal must therefore be to buttress and support the processes of free collective bargaining, on the assumption that we are headed for a normal economy, and to eschew ill-considered compulsory devices which, if applied at the beginning to wages, must eventually be applied also to prices, profits and production. Free enterprise will not long be maintained once we have abandoned free collective bargaining.

It is in this light that the public interest requires that proposals to change or implement our national labor policy be considered. For it has become apparent to the thoughful person that many of the proposals put forward ostensibly for the purpose of encouraging free collective bargaining will have just the opposite effect. Typical of those proffered panaceas are those that insist that the government must be ready to intervene as decision-maker in major disputes when the parties are unable to agree. Fact-finding in a variety of forms and compulsory arbitration are most freqently offered as the machinery by which government is to execute this function.

But any device that holds out the government as an available instrument for fixing wages, hours, and other conditions of employment impairs, to the extent of its availability, the process of collective bargaining. For in one party or the other to many major disputes the hope will persist that more can be gained by appealing to the government than by agreement; and the vicious circle is that, as the process of agreement-making is thus weakened, the need for government intervention will grow more critcial. Until the government makes as plain as the English language permits that it is out of the decision-making business, there must be included in the list of causes of strikes *the desire to compel government intervention.*

It is, moreover, not only in the immediate case that efforts to reach agreement are prejudiced by the readiness of a government agency to make the decision. Others in the same or related industries, or the same or adjacent areas, find themselves bound by a decision made in a case to which they were not parties. Regardless of protestations to the contrary, the undeniable fact is that from one or two major cases

in which the decision (regardless of whether it is labeled a "recommendation" or "finding") has been made by the government there emerges the equivalent of a national policy (*e.g.*, the 18½-cent pattern of 1945-46) from which deviation in other cases is extremely difficult if not wholly impossible, regardless of differences in wage history, cost considerations, competitive outlook, nature of operation, product, or even industry. The entire institution of collective bargaining is thus progressively weakened by government's assumption of the role of decision-maker.

Nor will the compulsive character of official activities be lessened by labeling the results as "findings" or "recommendations." Professions of the freedom of the parties to reject or accept the findings or recommendations are simply double-talk. The government's prestige, the force of public opinion demand obedience; indeed, the avowed purpose of the procedure is to induce acceptance through the operation of these forces.

Even in regard to limited categories of industries such as public utilities, to which proposals for government intervention might be confined, the same considerations are valid. It is, moreover, quite obvious that our integrated economy no longer permits easy definition of "industries affected with a public interest," particularly when what we are trying to define is a class of services the interruption of which entails significant inconveniences for the community. As introduced in the House and Senate, for example, the proposal for the creation of fact-finding boards[10] covered unsettled disputes certified by the Secretary of Labor as affecting or threatening to affect "the national public interest and . . . interstate and foreign commerce." Could the steel, meatpacking, transportation, maritime, or coal industries be omitted from such a broad definition? Could, in fact, any dispute involving several thousand workers be left out, whether it occurred in the automobile or the textile industry, or any of the other highly organized, mass-production industries? The War Labor Board's wartime experience reveals the difficulty of drawing a reliable distinction between disputes that threaten the public interest and those that do not. The criterion of the Board's jurisdiction was an interference, actual or threatened, with the war effort, evidenced by certification of the Secretary of Labor. It was soon found that strikes or potential strikes could not be isolated nor confined within geographical boundaries, nor could their contagious effects on workers not immediately involved be precisely foretold. And it was not easy to explain to workers that their dispute was not serious enough to warrant government's formal attention. The risk was that such a statement would be accepted as a challenge to aggravate the nature and threatening quality of the dispute. As a consequence, all disputes were held to be subject to the Secretary's certification because, with infrequent exceptions, each contained the seeds of widespread and contagious industrial conflict. It is doubtful that a peacetime agency could successfully resist the adoption of a similar practice.

Experience under the Railway Labor Act furnishes a very doubtful precedent

[10] H. R. 4908, 79th Cong., 1st Sess. (1945).

for broad extension of government intervention. As finally amended in 1934 it was, in the first place, the result of long experience with and constant change of earlier enactments which had sought unsuccessfully to deal with labor disputes in the railroad industry. The amendment of 1934 marked the culmination of fifty years of legislative experiment in this field of mediation. Under the Act of 1888, the Erdman Act of 1898, the Newlands Act of 1913, the Adamson Act of 1916, government possession during the first World War, and the Transportation Act of 1920 the results were dismal.[11] Even as radically altered in 1926 and finally amended in 1934 the procedure has not been foolproof. Witness the railroad strike of 1946. But aside from this half century of actual experience, the fact of critical importance is that, as adopted in 1926, the Railway Labor Act was the result of joint agreement between the unions and the carriers. If we are to be influenced by any precedent surely it should be by this fact of voluntarism.

In contrast is the unanimity of the great organizations representing labor and industry in vigorously opposing the application of the Railway Labor Act's fact-finding or emergency-board techniques to the rest of industry.[12]

IV

There are, however, steps the government can take, designed to aid parties to a labor dispute to reach their own agreement, but uncoercive in character. Two broad categories of activities can be envisaged. The first would include expansion and improvement of active government participation, limited, however, to mediation and conciliation; the second would consist of collating and making available information pertinent to many of the pressing issues in over-all management-labor relations as well as in particular disputes, and of furnishing personnel trained and expert in the technical problems that affect worker and employer.

As to the first, the government's mediation techniques and facilities have not kept pace with the growth in size and complexity of the problems of industrial relations. Few, if any, changes have been made in the organization and extent of federal conciliation facilities since the service was first established in 1920. Recent efforts of the Director of the Conciliation Service are very encouraging, however. He has, for example, established three separate bodies—the first an over-all advisory committee; the second a group of labor and management representatives of a particular industry, public utilities; and the third a group of labor-management representatives of a particular area, the Middle Atlantic states. This is a significant beginning of an effort to achieve labor peace on the basis of voluntarism. It is important, too, because it recognizes that in some situations successful labor-management relations can

[11] 25 STAT. 501 (1888); 30 STAT. 424 (1898); 38 STAT. 103 (1913), 45 U S. C. §§101-125 (1940); 39 STAT. 721 (1916), 45 U. S. C. §§65,66 (1940); 41 STAT. 456 (1920).

[12] See, for example, the recommendations of the U. S. Conciliation Service's Labor-Management Advisory Committee, N. Y. Times, Dec. 17, 1946, p. 1, col. 2. See also N. Y. Times, Jan. 6, 1947, p. 8, col. 1.

be encouraged if the problem is approached on an industry basis, while in others a community or area basis is needed. And it may well be, although this is not clear, that both specialized groups are to operate within the broad policies established by the advisory committee.

The expansion of such experiments as these will far more effectively promote industrial peace within the framework of a free economy than will any program based on coercion, regardless of what it is called. Labor disputes do not fall into logical patterns. Each is different from the others in issues, in character of past relationships, in personalities involved, in technology, in wage-price ratios, in industry and area repercussions. Experience has revealed that, because of such differences, flexibility in mediation and conciliation methods is of fundamental importance. A tripartite board of mediation will function successfully in some cases, a single mediator in others; area or community representatives will be effective in certain types of situations while in others designees of the industry in which the dispute has arisen will be able to exercise greater persuasive powers; in still other cases efforts of representatives of the industry immediately involved will be resented because of reluctance to disclose to competitors information of a confidential nature, while efforts of representatives of a related or wholly different industry will be welcomed. In some cities (New York and Toledo, Ohio, for example), local mediation facilities will possess advantages that state or federal agencies do not possess. Frequently different techniques will be required to avoid a strike than to settle one that has already occurred.

An expanded conciliation service will not achieve maximum efficiency if limited to a rigid or a single procedure. There must be in the hands of the responsible administrator authority to adapt mediation techniques to the characteristics of individual situations. The defect of many of the proposals that have been made for the establishment of super-mediation bodies is that they fail to take sufficient account of this need for adaptability,[13] and that they do not make plain that the government's aid will be limited to mediation and conciliation and will stop short of making official decisions or official recommendations in such form as to be tantamount to a dictated settlement. It is doubtful, moreover, whether any net gain will result from superimposing on the Conciliation Service a mediation agency with superior status. The probability is simply that a lot of cases that might have been settled by conciliation would be held out for the attention of the super-body in the hope that some advantage would accrue to one side or the other through the lapse of time necessary to get from conciliation to the super-agency or through the force of some other circumstance. It is fairly common knowledge that as long as some higher forum or official is available, the last ounce of effort toward compromise will not be made at the lower level but will be withheld until the higher forum is reached and its efforts invoked.

[13] The Ball-Burton-Hatch bill, for example, would have made it mandatory for the federal conciliation agencies to intervene in important disputes. As the bill is now worded there would be no opportunity to consider whether state or local mediation facilities could be utilized more effectively.

In any attempt to improve our mediation services the organization of government mediation in Sweden and its record of substantial achievement is worth careful study.[14] The country has been divided into seven districts with a mediator for each district. The mediator is given notice of the inception of negotiations which, by law, must commence not later than three months prior to the expiration of the current contract. He is thus qualified to enter the situation formally, should that become necessary, by his familiarity with local circumstances bearing on the issues, with the personalities representing the two sides, and with the particulars of the dispute. As a consequence his competence and impartiality evoke the confidence of both sides. The law establishing his office requires him carefully to report each case in which he participates. His reports are printed each year in summary form by the Ministry of Social Affairs, thus aiding in the establishment of responsibility of all participants in the mediation process, including the mediator himself, and building up case records to which other parties and mediators may have access. While the mediator has authority to require the parties to attend his meetings, all proposals for compulsory arbitration of the terms of settlement have been consistently rejected. This latter fact is true also of the procedures in Denmark and Norway.

It is not suggested that the patterns established in the Scandinavian countries, even though they have operated with marked success, would be adequate in this country, where our economy and all the components of industrial relations are vaster and infinitely more complex. But the experience of those countries, since the aspirations of workers and employers in any free economy are substantially similar, should surely be consulted before radical changes which would substitute coercion for freedom are enthusiastically embraced. There seems, for example, to be great merit in establishing mediation districts, either by geographical or industry boundaries (utilizing existing state and local mediation facilities); in vesting the officials of such districts with sufficient discretion so that the various techniques described above can be applied to the needs of different situations; in providing for ample time (say, three months) for negotiations for new agreements; in keeping the appropriate mediation official apprised of the beginning and development of bargaining; and in maintaining case-history records as guides in other situations.

Here, it is submitted, is a fertile subject for study by the Labor-Management Advisory Committee of the United States Conciliation Service. It is not clear whether this group is to be an organized, continuing body with recognized status, but consideration might well be given to granting it Congressional recognition and authorizing it to formulate, through agreement of its labor-management representatives, basic general policies and operating devices. Experience during World Wars I and II has demonstrated the fruitfulness of such a continuing organization. It could be of inestimable help, not only in settling major disputes through its own efforts, but also in proposing procedures for the settlement of other disputes through

[14] See PAUL H. NORGREN, THE SWEDISH COLLECTIVE BARGAINING SYSTEM (1941), esp. c. XI.

local or district or industry representatives. Through liaison maintained with the labor committees of the House and Senate, with the Secretaries of Labor and Commerce, and with other administrative officials concerned with labor policy, it could also aid in legislative and administrative functions dealing with the maintenance of industrial peace.

Such a group would possess the advantages of voluntarism, continuity of experience and policy, and adaptability. It would encourage agreement and stimulate joint effort by representatives of industry and labor in the solution of single disputes and in the formulation of broad policies.

V

There is a complementing service that might also be of assistance to industry and labor in the making of their own agreements. As collective-bargaining relationships acquire maturity the setting of wages and the adoption and modification of working conditions become less and less matters of chance, and more and more matters of sophisticated and rational discussion in which the possession of precise information, accurate data, and intelligent understanding become of critical importance.

The invaluable service rendered by the Bureau of Labor Statistics in compiling cost-of-living and wage-and-hour data could be supplemented by the gathering of information on other subjects that have assumed major importance in industrial relations. The 1945 blow-up over the subsequently disavowed Wallace report[15] and the current fracas over the so-called Nathan report[16] indicate, for example, the increasing significance in the settlement of labor disputes of wage-cost-price relationships. There is good reason to suppose that a clearer understanding of this subject than presently available reports permit would be of significant aid to both sides in resolving wage disputes.[17] The study now being made under government auspices of the feasibility and limitations of annual wage plans furnishes sound precedent for a similar study of wage and price relationships. Nothing helps so much in promoting co-operative efforts as does comprehension based on impartial sources of information.

Questions of labor productivity and unit labor cost are similarly obscured by the paucity of reliable information, and, so obscured, have been productive of much unnecessary disagreement. A project is now under way[18] to measure man-hours of labor required per unit of production cost, volume of production, and labor costs per unit of production. So far as news reports reveal, however, it is uncertain

[15] N. Y. Times, Nov. 2, 1945, p. 1, col. 6

[16] ROBERT R. NATHAN and OSCAR GOSS, A NATIONAL WAGE POLICY FOR 1947 (1946).

[17] On December 12, 1946, the Federal Trade Commission released some figures on the relation, by industry, of labor cost to dollar sales. The ratio varied from 3.2 cents per dollar of sales in cigarettes and tobacco products to 33.2 cents in hat and cap manufacturing. The figures, however, were for 1939 and did not purport to be complete. N. Y. Times, Dec. 13, 1946.

[18] *Productivity Changes Since 1939* (1946) 63 MO. LAB. REV. 893.

whether labor is to have representation on the committee responsible for making the survey or on whatever body is to have responsibility for interpreting the accumulated data. Nor is it apparent whether this is to be on an industry or craft basis nor how extensive its coverage is to be. If the results of this effort are to realize its fullest potential utility it is important that the project be beyond any challenge as to bias or coverage.

Related to questions of increased productivity and reduced unit labor cost are problems of technological improvement and worker displacement. In the great majority of instances worker resistance to the introduction of labor-saving devices is a natural reaction of fear of loss of the opportunity to earn rather than arbitrariness, meanness of spirit, or reactionary desire to retard mechanical progress. But since in the ultimate analysis it is economically possible to increase respective shares of the production pie only by baking a larger pie, it is important that the resistance be overcome; not, however, through such abortive devices as the Lea Act, but through understanding and intelligent application of the history of technological advance, the essence of which is that more and larger earnings opportunities are created than are lost by improving technology. Here, too, the government, as the source of impartial analysis and information, can render useful service by a careful study of the effects of technological innovations on earnings opportunities and by readiness and ability in a particular situation to explore with company and union the probable consequences of a contemplated machine innovation, change of operations, or material, and methods by which the economic impact on the workers can be avoided or minimized.

There are unquestionably many other directions in which the government could exert fruitful effort in accumulating and making widely available information and data to be utilized in individual disputes or as the basis for the formulation of national policy. The success and mechanics of profit-sharing plans that might make possible more generous worker participation during years of unusually profitable operations, without raising the basic wage structure to a level which in ordinary or lean years would constitute a competitive embarrassment to the employer, is certainly worth more official study than it has yet received. Various kinds of incentive systems, their methods of operation, their effects on production and earnings, and their adaptability to operations and industries in which their introduction has been opposed, are another rich field of inquiry. Careful job analysis and evaluation and the establishment of effective job differentials can do much to eliminate in-plant dissatisfaction.

It is firmly believed that, if the government were able to make available not only information on these matters, but also persons trained and expert in these fields who could be invited by disputing parties to aid them in the solution of particular problems, the science of collective bargaining and its potential accomplishments would be vastly enchanced.

VI

The preceding discussion has dealt only with those aspects of government policy that might encourage free and private agreement-making. But since the ultimate result of that process is an agreement, the success of the entire policy must turn on the honest adherence by both sides to the obligations and responsibilities explicit in the agreement and implicit in the relationship. There cannot, in other words, any longer persist any doubt regarding the enforceability of these agreements or the availability of sanctions for their breach.

There is much misunderstanding as to the legal status of collective-bargaining agreements. Contrary to popular impression they are enforceable, and have been enforced by the courts in suits by employers, by unions and by employees.[19] A good deal of the confusion results from the failure of the courts to define clearly the nature of the rights being enforced or the legal character of the contract. Some courts, for example, have adopted the theory that such agreements establish a usage or custom which, by implication or express agreement, becomes a part of the individual employment contract,[20] and that it is only this individual contract that is being enforced. Such a theory is obviously defective in ignoring the relationship between the union and the employer.[21] In other courts suits have been maintained on the ground that the contract was made by the union as agent for the employees;[22] and in others the rationale has been that the contract is enforceable like any third party beneficiary agreement.[23] It would be obviously desirable, because of the importance of the interests not only of the immediate parties to the contract but of the entire community in insuring the stability that inheres in firm labor contracts, for the courts to

[19] "That any individual can obtain redress for the breach of a collective bargaining agreement is 'no longer' an open question. I say 'no longer' because earlier courts accompanied their, shall we say rigid attitude toward the working man or woman, generally, by a specific hostility to his rights under a collective labor agreement. But modern judges, despite the divergence of theories adopted, will enforce these agreements at the instance of employer, employee or union. Nor will specific enforcement be barred by the ancient and now considerably weakened 'slavery' doctrine. Whatever the effect given to individual employment contracts, collective agreements are held to be in a special category. So where money damages are inadequate equity will enforce their terms." Clark, J. dissenting in N. L. R. B. v. Newark Morning Ledger Co., 120 FED. 2d 262 (C. C. A. 3d 1941), *cert. denied* 314 U. S. 693 (1941).

"A union, although a voluntary unincorporated association, is legally responsible for its acts in much the same way that an individual, a partnership or a corporation is responsible. If a union, through its constituted agents, commits a wrong or is guilty of violence or of illegal oppression, the union, and not merely the individuals who are the direct instruments of the wrong, can be enjoined or made liable for damages to the same extent that the union could be if it were incorporated; and the funds belonging to the unincorporated union can be reached to satisfy any damages which might be recovered for the wrong done." BRANDEIS, BUSINESS—A PROFESSION (1933) 93.

[20] System Federation v. Louisiana & A. Ry., 119 FED. 2d 509 (C.C.A. 5th 1941); Hudson v. Cincinnati, N. O. & T. P. Ry., 152 Ky. 711, 154 S. W. 47 (1913). The major defect of this theory is that it leaves unresolved the question of suit between the union and the employer.

[21] Nederlandsch Amer. S. M. v. Stevedore's & Longshoremen's Ben. Soc., 265 FED. 397 (E.D. La. 1920); Schlesinger v. Quinto, 201 App. Div. 487, 194 N. Y. SUPP. 401 (1st Dept. 1922).

[22] Barnes & Co. v. Berry, 169 FED. 225 (C. A. A. 6th 1909); Mueller v. Chicago & N. W. Ry., 194 MINN. 83, 259 N. W. 798 (1935); Hall v. St. Louis-S. F. Ry., 224 Mo. APP. 431, 28 S. W. 2d 687 (1930); San Antonio & A. P. Ry. v. Collins, 61 S. W. 2d 84 (Com. App. Tex. 1933).

[23] Moore v. Illinois Cent. R. R., 24 F. SUPP. 731 (S. D. Miss. 1938), *aff'd.* 312 U. S. 630 (1941);

adopt or the legislature to establish a clear and uniform basis for enforcing these agreements.[24]

But aside from the uncertainty and lack of understanding as to judicial enforcement of labor contracts, the factor that has probably been most responsible for the reluctance of employers and unions to seek court relief is the complete unsuitability of orthodox legal procedures. The time has surely come for the development of a legal pattern that will protect the dominant public interest inherent in responsible and bona fide collective bargaining by giving to the fruits of the process the widest recognition and protection.[25]

In the search for such an appropriate procedure it will be apparent, in the infrequency with which court help has been invoked by either side, that traditional judicial methods of enforcing commercial contracts are ill-adapted to the collective agreement. Court proceedings are generally costly, they are prolonged and technical, and courts are bound by statute and centuries of common law to invoke doctrines and practices developed in other fields of law or in the days of smaller business units and more personal employment relationships. Also important is the fact that labor distrust of the judiciary, particularly of state and local courts, which originated with the indiscriminate use of the injunction and with the treatment of labor organizations as criminal conspiracies, has by no means been entirely dissipated. Another factor that cannot be overlooked is the lack of expertness in labor matters to which most judges would be the first to confess.

On an ever-increasing scale, therefore, the need for peaceful methods of settling alleged breaches of the contract and for devising and imposing appropriate and workable remedies and sanctions has been met by adoption of a system under which all such claims, not settled by negotiation according to a defined procedure, are sub-

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Yazoo & M. V. R. R. v. Sideboard, 161 MISS. 4, 133 So. 669 (1931); Gulla v. Barton, 164 APP. DIV. 293, 149 N. Y. SUPP. 952 (3rd Dept. 1914).

For a thoughtful analysis of these theories (usage, agency and beneficiary) see Anderson, *Collective Bargaining Agreements* (1936) 15 ORE. L. REV. 229, and Christenson, *Legally Enforceable Interests in American Labor Union Working Agreements* (1933) 9 IND. L. J. 69.

[24] A note in (1932) 41 YALE L. J. 1221 suggests that "the most effective legal formula capable of contemporary use in the enforcement of collective agreements would be treatment of the agreement as a valid contract between the employer and the union, creating a usage which becomes a part of all existing and subsequent individual employment contracts, unless either the employer or the employee, with actual knowledge of the agreement, voluntarily waives its benefits." Since the adoption of the Wagner Act and the decisions in J. I. Case Co. v. N. L. R. B., 321 U. S. 332 (1944) and Order of R. R. Telegraphers v. Railway Express Agency, 321 U. S. 342 (1944), it is very doubtful whether the employer and an employee within the bargaining unit may agree to waive the terms of a collective agreement negotiated by the exclusive representative.

[25] In any discussion regarding the legal accountability of labor unions one cannot omit nor minimize the deep significance of the Supreme Court's decision in Steele v. Louisville & N. R. R., 323 U. S. 192 (1944) and Tunstall v. Brotherhood of Locomotive Fireman, 323 U. S. 210 (1944), in which the Court upheld the right of Negro employees, not members of the union that represented their crafts, to enforce by injunction and damages the duty of the union to represent all members of the craft impartially. See Note (1945) 58 HARV. L. REV. 448, and Freidin and Ulman, *Arbitration and the National War Labor Board* (1945) 58 HARV. L. REV. 309, 336-339.

mitted to arbitration for final determination.[26] It has not yet, however, been made as certain and explicit as it should be that the jurisdiction of such an arbitrator includes authority to act upon employers' claims of contract breach by the employees or the union, and authority to impose suitable penalties.

What is called for, then, is a procedure for the enforcement of labor agreements specially adapted to the collective-bargaining relationship. Every such agreement should embody, either by specific agreement of the parties or by operation of law, provisions for the resolution of claims of breach by either side. It should embody also provisions for suitable remedies and the imposition of effective sanctions by an impartial person or board, chosen preferably by the parties, but in default of their agreement designated by an appropriate government official, it being clearly understood that such a person or board is to possess no authority to add to, subtract from, or modify any provision of the basic agreement. With such a procedure available for the peaceful resolution of "interpretational" disputes, no fair-minded person could then oppose a no-strike, no-lockout clause, as a term, express or legally implied, of each collective labor agreement.

Any such program designed to insure adherence to agreed-upon contract provisions would also need to consider appropriate implementations of the Wagner Act[27] and possibly the Norris-LaGuardia Act.[28] For there would then be little justification for continuing to extend the immunities of those statutes to employees who, in disregard of adequate peaceful procedures by which they can achieve redress for their grievances, seek to utilize self-help.

Past experience indicates that in many situations practical considerations persuade an employer, seeking to deal with breach of the agreement by individual employees acting without union support or authorization, to look in the first instance not to the courts nor to his right to discharge or suspend, but to the union to enforce discipline among its members and adherence to the contract terms. Indeed, the willingness of a union to assume this function and its capacity to carry it out constitute one of the major reasons for insuring the union's status through provisions making union membership a condition of employment. Consequently, there is sound reason for bringing the union within the orbit of accountability for claimed breaches of contract not only by itself but by its members. This result can be accomplished by enabling an employer, before he attempts himself to discipline an employee whom he asserts has breached the contract, to call on the union to do so. If the union should default in executing this responsibility the employer would then be free of the restrictions of the above-mentioned statutes in suitably disciplining the employees. In that event, too, the union as well as the employee in question might well be con-

[26] *Trade Agreements* 1927, B. L. S. Bull. No. 468 (U. S. Dept. Labor 1928) 6; *Arbitration Provisions in Union Agreements*, B. L. S. Bull. No. 78 (U. S. Dept. of Labor, 1944).

[27] 49 STAT. 449 (1935), 29 U. S. C. §150 *et seq.* (1940).

[28] 47 STAT. 70 (1932), 29 U. S. C. §101 (1940).

sidered as having violated the contract terms—a question which, in the last analysis, would be justiciable through the arbitration machinery already described.

In connection with this question of contract enforceability the Swedish experience should also be of much interest.[29] In Sweden too, prior to the adoption of legislation specifically addressed to the question, the courts had decided that trade unions and employers' organizations were responsible at law for breach of contract obligations. But this precedent, established in 1915, was rarely used as the basis of litigation in the years that followed. Largely the same as those that have obtained here, the reasons were that the courts were notoriously slow in handling such cases and were excessively limited by traditional legal concepts. Neither the unions nor the employers were anxious to start suits which might drag out over a year or more and then yield highly unpredictable results. Prior legislative efforts in 1910 and 1916 "to promote industrial peace," both of which, be it noted, distinguished between disputes incident to the making of new agreements (these to be subject only to mediation) and "interpretational" disputes, had failed. But in 1928 the Independent-Liberal coalition government introduced and succeeded in enacting the Collective Agreement Law and the law providing for a labor court.[30] Leaving the making of agreements to the parties, aided only by government mediation facilities, and leaving unaffected the strike or lockout as an essential part of the agreement-making process, the former act outlaws strikes and lockouts over disputes regarding the application or interpretation of an agreement, and sympathy strikes "if [the organization being supported] does not itself possess the right to take coercive measures," and provides that if either of the parties evades any of its contract responsibilities it may be held liable for the damage sustained by the other.[31] This latter provision is the basis for the companion enactment, the labor court law, which establishes a tribunal for the exclusive purpose of dealing with "interpretational" and similar disputes, empowered to award damages, in the event of a breach, against the employer, the union, or the individual employees. The tribunal is noteworthy in three respects—its composition, its limited jurisdiction, and its flexibility in devising sanctions. Tripartite, it is composed of a chairman and two members representing the public, and four additional members, two selected from designees of the Swedish Employers' Advisory Board, and two from designees of the Federation of Trade Unions. Its jurisdiction is limited to disputes regarding the interpretation of a contract. And, probably of equal importance in the degree of success achieved, it is empowered

[29] See PAUL H. NORGREN, THE SWEDISH COLLECTIVE BARGAINING SYSTEM (1941).

[30] *Id.* c. XV. It may be of interest to the new Congress to notice that both of these statutes, which have operated with notable success, were prepared by a commission of experts, specifically designated for the purpose, after intensive study and consultation with organizations of employers and unions.

[31] In addition to this general provision a supplementary clause provides: "If the degree of the defendants' guilt, the injured party's connection with the origin of the dispute, the magnitude of the injury inflicted or other circumstances warrant it, the amount of the damages awarded may be reduced, even to the extent of full exoneration from liability. In no case may an individual worker be required to pay damages in excess of 200 Kroner."

to exonerate any party from guilt partially or wholly, thus being enabled to limit its decisions to the probable area within which they will be acceptable to both sides.[32]

Despite initial opposition by the Swedish unions, both acts have operated with a high degree of success. Union claims have run the gamut—hiring, dismissal, hours of work, classification, overtime, etc. Employer claims have been largely limited to strikes or to boycotts during the term of the agreement.

For us the significance of the Swedish experience is the combination of voluntarism in the making of agreements and legal compulsion in enforcing adherence to their terms. This is the aspect, it is submitted, that must furnish the key to a successful and acceptable labor policy in a democracy.

VII

It has been suggested that a successful government policy must embody respect for the personal and economic liberties of all citizens, employers and employees, and that it must reject compulsion in favor of voluntarism. But it is not only the government in formulating a policy whose actions must be so limited. Similar limitations must obtain with respect to the practices of employers and unions who are to operate within the policy. There is no justification, economic or social, for either discriminatory employment practices by an employer or discriminatory membership practices by a union.

Where closed shop, union shop, or maintenance of membership agreements make continued membership in the union a condition of employment, it is essential that the procedure preliminary to expulsion from the union, which would be followed automatically by discharge, meet fundamental requirements of fairness and due process, and that the causes for expulsion exclude the exercise of basic human privileges. Most union constitutions and by-laws include such safeguards. But even though the instances in which they do not are few, the injustice and the hardship may be great and, because loss of seniority is involved, irremediable. Where membership in the union is a condition of getting a job in the first place discriminatory exclusions from the union should be equally barred.

The legal right to enter into a contract that makes union membership a condition of employment is a special exception, written into the Wagner Act, to the general prohibition against discrimination on the ground of membership or non-membership in a union. But this special statutory immunity should not be enjoyed by a union which itself practices intolerance, nor should it be distorted into a vehicle for anti-democratic practices.

In the *Steele* and *Tunstall* cases,[33] the Supreme Court determined that the union's right to decide questions affecting its own membership does not include the right to engage in racial discrimination. But there are other forms of equally unjustifiable

[32] Two-thirds of its decisions have been unanimous. Compare figures on the tripartite National War Labor Board, with approximately 75% unanimity.

[33] See note 25, *supra*.

discriminatory reprisals. In the *Portland Lumber* case,[34] for example, an employee had been expelled from the union for acting as a watcher for a rival union at an election ordered by the National Labor Relations Board. In the *Wallace Corporation*[35] and the *Cliffs Dow Chemical Company* cases,[36] the expulsions took place because the employees had previously supported rival unions. In other cases involving questions independent of the Wagner Act employees have been expelled for criticizing union officers and committees,[37] for testifying in an arbitration proceeding in favor of the company,[38] for refusing to join in a strike in violation of an existing agreement,[39] and for refusing to reduce their tempo of work.[40]

Solutions to some of these problems have been sought by the NLRB through imposing on the employer the duty to refuse to discharge an employee pursuant to the contract, notwithstanding loss of union membership, unless he is satisfied that neither the ground nor the procedure of union expulsion deprived the employee of fundamental rights. But this, it is submitted, is an incongruous way to reach an obviously desirable result.[41] The result could be accomplished more directly by extending the Labor Relations Board's process to this type of discriminatory practice and by authorizing it in appropriate cases to withdraw the special statutory exception from any union whose constitution and by-laws fail to conform to minimum standards of fairness or who, in actual practice, honor such standards more in the breach than in the observance. Furthermore, the determination of such basic policy considerations is the true province of the legislature rather than of judicial or administrative bodies.

Many strong arguments have been marshalled by the unions against interference with or supervision of their internal affairs. There is undoubtedly a good deal of truth in their assertion that such efforts frequently are fronts for anti-union drives. But while it may be conceded to be generally desirable, "a union's free and autonomous control of its membership ought not to be made a fetish."[42] If the union with a closed-shop contract erects arbitrary obstacles in the way of membership or capriciously exercises its powers of expulsion and suspension, the evils of discriminatory monopoly are at once apparent.

Federal and state labor laws have expanded our concept of economic democracy

[34] Portland Lumber Mills, 64 N. L. R. B. 159 (1945).

[35] Wallace Corp. v. N. L. R. B., 323 U. S. 248 (1944).

[36] Cliffs Dow Chemical Co., 64 N. L. R. B. 1419 (1945); see also Southwestern Portland Cement Co., 65 N. L. R. B. 1 (1945).

[37] John Wood Mfg. Co., 17 L. R. R. MAN. 2671 (1945).

[38] Link Belt Co., 17 L. R. R. MAN. 2775 (1946).

[39] Sheffield Steel Corp., 28 WAR LAB. REP. 121 (1945).

[40] Ford Motor Co., 14 L. R. R. MAN. 2625 (1944).

[41] The Fifth Circuit Court of Appeals has recently reversed such an order of the NLRB directed against the Aluminum Company of America. N. Y. Times, Dec. 31, 1946, p. 9, col. 3 (Not yet officially reported). See also Freidin, *Some New Discharge Problems Under Union Security Covenants*, 1946 WIS. L. REV. 440.

[42] Willcox, *The Triboro Case—Mountain or Molehill?* (1943) 56 HARV. L. REV. 576.

by adding to the strength and prestige of labor unions. The steadily increasing membership of unions and their economic and political significance point to the need for procedures which promise internal democratic freedom to their members. Many of the largest and most powerful unions have on their own initiative recognized this necessity through appropriate provisions in their constitutions and by-laws. Others have not yet done so. Their occasional practices of bringing about the discharge of workers who seek to shift to another union or to exercise some other personal right operate to defeat the very freedom of choice which the labor laws, from which they derive much of their strength, were designed to protect.

VIII

The single essential to the success of any national policy is, in the last analysis, its broad and genuine acceptance by the people it is to affect. So it is with any policy directed toward encouraging and preserving industrial peace. Unions must be rid of the notion that they must fight continously and aggressively for their existence. This must come about not through laws but through the positive actions of management. And it seems obviously to management's and the nation's interest to put forth such efforts, for union insecurity is the manna upon which extremists feed. And unions must assume the reciprocal obligation of developing a program demonstrating their unqualified adherence to our system of private enterprise.

In the years immediately following adoption of the Wagner Act relatively little was realized from the collective bargaining process, principally because employers were still engaged in utilizing and abusing their concentrated strengths in an effort to prevent the growth of trade unionism and its spread to the mass-production industries. This, in turn, engendered in the unions a distrust of management as a class, many indications of which still persist. Not distrust over some single issue, but distrust generally of the bona fides of employers. Some of these practices have now been outlawed, others voluntarily abandoned. Some still remain. And to the extent that they are not abandoned they will continue to reflect an attitude which will preclude full development of the mutual trust and understanding which must furnish the base of stable and satisfactory relations.

But contemporaneous with the growth of union power since 1937 there have developed a number of union practices which have provoked in many employers, and in large segments of the public, if not a distrust of unions as a class, then an uncertainty regarding the legitimate areas of collective bargaining, union objectives, and the means adopted to secure those ends.

The likelihood of the success of a program based on the public interest in preserving voluntarism in industrial relations will be considerably enchanced if both sides are free of the resentments provoked by a perpetuation of such practices, each one of which is probably minor, but which in the aggregate constitute a source of major friction. This is not to suggest by any means that all the excesses on the one

side have been removed. The daily news reports are proof enough of the contrary. But at least broad definition of employer responsibility has been attempted by both statute and case law. An equally deliberate effort is yet to be undertaken on the other side. The possible lines of inquiry are many. They have been suggested in a number of recent articles and in proposed legislation in the consideration of which the risks of mistake and injustice are increased by the emotions that are bound up in the subject. But the stakes are high, for we are dealing not only with economic stability but with the individual human rights of millions of citizens. Dispassionate and careful results are most likely to come if they are the result of agreement, or at least exploration, by such a joint body as a congressionally authorized labor-management conference with a duty to report within a fixed time to a joint congressional committee.

The ultimate aim of such a conference might well be described as the determination of standards of impropriety, the application of which would bar guilty participants from the special benefits and immunities of such laws as the Wagner and Norris-LaGuardia Acts. Such standards should be addressed both to the legitimacy of trade-union objectives and the means adopted by unions to accomplish their aims. One of the essential purposes of government is to draw distinctions between legitimate and illegitimate conduct; and this is a continuous process that must be sensitive of and responsive to changes in the social and economic mores of the times. No segment of society can insist on absolute freedom from this process of constant reappraisal. A respected contemporary philosopher has observed[43] that "Like science, liberalism insists on a critical examination of the content of all our beliefs, principles, or initial hypotheses and on subjecting them to a continous process of verification so that they will be progressively better founded in experience and reason."

To say, as was said at the outset of this paper, that the Wagner Act has largely succeeded in accomplishing its avowed purpose—the elimination of controversies regarding issues of organization and representation—is not to say that the Act in its present form is the perfection of legislative efforts; nor is it, obviously, to conclude that a decade of actual experience has not brought to light difficulties in its administration and new problems that it does not undertake to treat. Many of these matters have recently been the subject of careful analysis.[44] Some have already been legislatively treated (the Hobbs and Lea Acts);[45] others are embodied in proposed

[43] COHEN, THE FAITH OF A LIBERAL (1946) 8.

[44] See, for example, Gregory, *Something Has to be Done*, Fortune, Nov., 1946, 132; Note (1946) 59 HARV. L. REV. 747.

[45] 60 STAT. 420 (1946), 18 U. S. C. A., §420a *et seq.* (Supp. 1946); 60 STAT. 89 (1946), 47 U. S. C. A. §506 (Supp. 1946). The Lea Act was held by a United States District Court to be unconstitutional on the ground, among others, that it undertook to deprive broadcasting station employees of rights that other employees continued to retain. U. S. v. Petrillo, 19 L. R. R. 2088 (N. D. Ill. 1946).

law (Case Bill, Ball-Burton-Hatch Act.)[46] The dangers of this bits-and-pieces approach prompt me to suggest a broad, inclusive review by labor and management representatives, culminating in a joint report to Congress. Such a review would have the great advantage of being based upon a realistic understanding of the facts of industrial life. It is not too much to hope that such realism would succeed in charting out large areas of agreement on such questions as: strikes that violate policies embodied in federal statutes or that are in breach of existing agreements; picketing that prevents entrance to and exit from the plant by supervisors not involved in the strike or others who do not choose to join it; boycotts having for their purpose not improvement in wages and working conditions, but total and unconditional exclusion from the market or the maintenance of artifical price levels; the use of abusive or false propaganda and the need for more clearly defining freedom of employers and unions to express their views during a labor dispute; and strikes or other coercive measures intended to discourage the introduction of labor-saving devices or improved techniques or materials.

These questions, involving the nature and extent of reciprocal rights and obligations of labor and management, can properly be viewed as matters for joint inquiry. The jurisdictional strike, on the other hand, directly involves only the rights and obligations of the unions, with management helpless to provide the solution although it suffers directly from the dispute. This, then, is a problem that the unions themselves must resolve or have government resolve for them.

The Wagner Act provides a procedure for the peaceful resolution of one kind of inter-union difference. When the dispute between two unions is over the question of which one has the right to act as the bargaining representative of a given group of employees—when, in other words, an employer is faced with competing claims of representation—he or either of the unions may petition the National Labor Relations Board to decide the question, and the decision is enforceable in accordance with the procedures of the Wagner Act.

With respect, however, to inter-union differences over the question of which union's members are to perform certain categories of work, no such procedure is available. The need for a mechanism to resolve this type of dispute was recognized by organized labor during the war. At the instance of the War Labor Board agreement was reached by the AFL and the CIO that jurisdictional differences of this nature, if they could not be settled by the local unions immediately involved, would be referred to the heads of the international unions or to the presidents of the AFL and CIO. If the disputes were not disposed of in that way it was agreed that they were to be submitted to final arbitration.

Peacetime finds us without any substitute machinery although the need for some such procedure is patent. If organized labor cannot itself devise a means of re-

[46] See Forsythe, *The Settlement of Contract Negotiation Disputes: A Comparison of Proposed Legislation, supra.*

solving such conflicts without needless and costly interruptions to production, then government must assume the duty of finding a method, even though it might work in less than 100 per cent of the cases. The NLRB procedure for dealing with conflicting claims of representation seems adaptable to the jurisdictional dispute over assignment of work. There might well be procedure for a formal appeal to the appropriate union heads in the event of a strike over such an issue. Upon their failure to agree upon either a substantive settlement or a procedure for settlement the government should be ready to appoint an arbitrator whose decision would be accepted at final.

Here, too, it seems entirely possible to facilitate peaceful resolution of these disputes by agreement in advance as to the standards that should normally govern the unions in reaching agreement or the arbitrator in making his award. The feasibility of advance definition of such standards is indicated by the War Labor Board's success in acting on such disputes on the basis of the principle that the right to perform various classifications of work, the question not being covered by specific contractual provision between the company and either of the unions involved, is to be governed by local area or industry practice.[47]

[47] H. K. Ferguson Co., 13 WAR LAB. REP. 418 (1944); Mountain States Tel. & Tel. Co., 14 WAR LAB. REP. 569 (1944).

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